THE LAW OF WILLS.

PART I.

EMBRACING THE MAKING AND CONSTRUCTION OF WILLS; THE JURISPRUDENCE OF INSANITY; THE EFFECT OF EXTRINSIC EVIDENCE; THE CREATION AND CONSTRUCTION OF TRUSTS, SO FAR AS APPLICABLE TO WILLS.

WITH

FORMS AND INSTRUCTIONS FOR PREPARING WILLS.

BY

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SECOND EDITION.

THE time has been so short since the publication of the first edition, that no very material alterations or additions have been made, except to insert the later decisions, both English and American, which has been carefully done.

I. F. R.

BOSTON, May 1, 1866.

PREFACE.

THE present volume, which is complete in itself, comprises the largest proportion, both in labor and extent, of the entire work, which has been announced, for a considerable time, under the general name of Wills. The subject, as the work progressed, naturally divided itself into two parts; Wills; and the Duties of Executors and other Testamentary Trustees.

The former is now offered to the profession. It embraces all the topics usually discussed in connection with the creation and construction of Wills and Testamentary Trusts; including Testamentary Capacity, and the Jurisprudence of Insanity, so far as connected with that subject; the Execution, Revocation, and Republication of Wills; the Construction of Wills; the Admissibility and Effect of Extrinsic Evidence in aid of such Construction; the Creation and Construction of Testamentary Trusts; and the Forms of Wills; with Instructions and Notes in regard to preparing the same; and many other incidental matters.

It is not expected to supersede, altogether, the necessity of resort to the more extended English works upon the same topics; but it is hoped that the present work will be found to contain all that is most essential, in Jarman on Wills; Wigram on Extrinsic Evidence in aid of the Interpretation of Wills; Lord St. Leonard's Essay on Wills; and the Elementary treatises upon the Jurispru-

dence of Insanity, so far as testamentary capacity is concerned.

The Second Part of the work, which is confined to the practical detail of the Settlement of Estates, and the administration of Testamentary Trusts, including Devises and Legacies, is nearly ready for the press, and may be expected in a few months. Some few of the topics discussed in Jarman will more naturally fall into this portion of the work.

It is scarcely necessary for the author to say much of the character of his work, since that must depend more upon the work itself, than upon any thing which may be said of it, even by the most disinterested. But it may not be improper to give an outline of what has been attempted.

It has been the purpose of the writer to refer to all the leading or important English cases upon the several topics discussed, and to give the precise point determined, either in the text or the notes. And where there was any conflict in the decisions, it has been his purpose to give the history of the different classes of authorities, in such a manner, as to present the true principle to be extracted from all the cases bearing upon the point. And upon every point to bring the cases down to the latest moment, so as to give the true state of the English law at the time of publication.

In this way, it is believed, the work will be found to present, in a compact and perspicuous form, the elementary principles involved; and at the same time such a digest of the decided cases, as to become a useful commentary upon the subjects discussed, and a reliable guide, both for the student and the practitioner.

The careful analysis of the entire work, which follows next in order after the preface, and which consists of the analyses of the several chapters and sections, will

enable the practitioner, at a glance, to turn to the precise point, in any part of the work, upon which he may desire to consult the authorities; and will, at the same time, afford a valuable aid to the student, in fixing the important principles discussed throughout the work, methodically in the memory.

The extensive discussion of the Jurisprudence of Insanity, affecting testamentary capacity; and also of the effect of Extrinsic Evidence in aid of the Interpretation of Wills; as well as the Forms and Instructions for preparing wills; are new features, in respect of the works hitherto in use in this country, upon the subject of Wills; and it is hoped they will be found interesting to the student, and valuable to the practitioner.

The Alphabetical Index has been carefully prepared, and will afford a ready guide to almost every thing contained in the work.

In regard to the American cases, it has not been possible to give the same perfect and thorough analysis as of the English cases, in consequence of the almost infinite number, and great diversity of the cases. But it has been attempted to give all that was valuable or important in the American law upon all the points discussed, and especially where there was any considerable conflict in the English cases.

More attention has been bestowed upon the law of those States where the jurisprudence, being of earlier date, has become more settled; and where the cases are more numerous, and more important, as well in regard to the principles involved, as the amount in controversy.

And, in conclusion, it is proper to say, that notwithstanding every word of the work, both of the text and notes, has been prepared and revised by my own personal labor, I have received very essential aid in the collection and arrangement of the American cases, and in the verifi-

cation of the references, from William A. Herrick, Esq., of the Suffolk bar; a gentleman already favorably known to the profession, both for industry and ability.

There will be found some typographical errors, and some, perhaps, of a more serious character; but it is hoped, with all its defects, the work will be received with the same kind indulgence, hitherto extended to the author, for which he desires here to express his sincere thankfulness.

I. F. R.

Boston, July 6, 1864.

☞ *The reference to the notes in some of the heads of chapters was slightly deranged by inserting additional notes, but it is corrected in the following analysis of contents.*

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THE LAW OF WILLS.

CHAPTER I.

INTRODUCTION.

1. The right of testamentary disposition, although instinctive, is the offspring of municipal law.
2. The history of testaments, in early ages, matter of curious research.
3. They existed at a very early day among the Hebrews, the Athenians, Romans, &c.
4. The right in England very much restricted until a late period.
5. These restrictions no longer exist there; and never existed here, except in regard to the widow.
6. In the State of Louisiana, the restrictions of the Civil Law obtain.

n. 10. History of the law of wills in England.

§ 1. 1. The right of testamentary disposition of property is, unquestionably, one of the results of cultivated social life, and dependent upon municipal law. But it is, nevertheless, an instinctive sentiment, intimately associated with that love of acquisition, and of dominion, which forms the basis, and the stimulus, of all social progress; and which, in its normal development, is the sure measure of advancing civilization, and, in its morbid excesses, equally marks the process of declension, and the increase of crime.

2. There is a great deal of curious learning in regard to the history and the forms of testaments, among the nations of antiquity, and in the earlier periods of the modern history of European nations, which is of interest, chiefly, as matter of antiquarian research. Mr. Justice Blackstone[1] has given a * synopsis of the best authenticated facts upon this subject, in a form most agreeable to all readers, and containing all which it is important for the general scholar or the professional student to consult.

[1] 2 Black. Comm. 488–492. See also, 4 Kent Comm. 501–504.

3. It is obvious, from instances named in Holy Scripture, that the practice of making testaments existed among the Hebrews in the days of the patriarchs.[2] The right of testamentary disposition of property was introduced into Athens by the laws of Solon.[3] It existed among the Romans, in three different forms, before the date of the Twelve Tables.[4] And traces of its existence are found among the Germans, and other Continental nations of Europe, at a very early day, and among the very earliest vestiges of judicial history in the island of Great Britain.[5]

4. But before the Statute of Wills,[6] in England, the right of testamentary disposition of property, in the subjects of the crown, did not extend to real estate; and as to personal estate,[7] it was limited, unless the testator had neither wife nor children. If he had both, he could dispose of but one-third of his personal estate by will, the other two-thirds being regarded as the reasonable share of the wife and children respectively; while if he had *either a wife or children, but not both, he might dispose of one-half, the remainder belonging to either the wife or children, as the case might be.[8] The wife and children had a special writ, provided for the recovery of their just share of the executor, denominated the writ de rationabili parte bonorum.[9]

5. This restriction no longer exists in England, either as to real or personal estate,[10] and it never existed in this country, except in

[2] The case of Abraham, who, in lamenting his want of legitimate heirs, exclaims, that this Eliezer, the steward of, and servant born in, his house, should take his estate, has been quoted by some as an instance of appointing an heir by will. Gen. ch. xv. But the case of Jacob, giving his son Joseph a double portion of the inheritance, which must have been done by will, seems more unquestionable. Gen. ch. xlviii.

[3] Plutarch's Life of Solon; 4 Kent Comm. 503.

[4] Chitty's note to 2 Black. Comm. 491.

[5] 2 Black. Comm. 491.

[6] 32 and 34 Hen. 8.

[7] The term personal estate is here held to include terms for years, and chattel interests in land. Co. Litt. 111 b, n. 1, by Hargrave. But lands held in gavelkind, and in the borough of Kent, were devisable by special custom, from a very remote period. 2 Black. Comm. 84; F. N. B. 198; Launder *v.* Brooks, Cro. Car. 561.

[8] F. N. B. [122], 9 ed. H. b; 2 Saund. 66, n. 9; 2 Black. Comm. 492.

[9] F. N. B. [122], 9 ed. H. b.; Co. Litt. 176, n. 3, by Hargrave.

[10] There is not a perfect agreement, among English law writers, upon the question whether it was the old common law of the realm, or the custom of particular counties, by which this restriction upon the disposition of property by will existed.

regard to the widow of the testator, whose right to dower and to a share in the personal estate of her husband is secured by statute, in most of the American states, and which, being in the nature of a vested right, during the life of the husband, is not liable to be defeated by the will of the husband.[11]

* 6. In the State of Louisiana, the right of disposing of property by will is limited, where the testator leaves descendants; if but one, he may dispose of two-thirds of his estate; if two, of one-half; if three, of but one-third.[12]

But all agree that the restriction was extensive, if not universal. The form of the writ, in Fitzherbert, Natura Brevium, would seem to indicate, that it rested mainly on custom, since it recites, that "whereas according to the custom which hath hitherto obtained, and been approved in the county aforesaid." F. N. B. [122], 285. But Lord Hale says, in his Notes to F. N. B. ib., that it hath obtained at common law, and never been demurred to. And Blackstone, Somner, and some others, maintain that it was a common-law right, while Lord Coke asserts the contrary. The subject is of too slight consequence in this country to be further pursued here. The right to dispose of all one's personal property, by will, was not secured throughout all the counties of England, until a comparatively recent period. 2 Black. Comm. 492, 493; 1 Williams' Executors, 2–4, and note. This right is now, by statute, 1 Vict. ch. 26, extended to all real estate, as well as personal, which one shall be entitled to, either at law or in equity, at the time of his death. This statute, sec. 1, called the interpretation clause, defines "personal estate," as extending to leasehold estate and other chattels real, and also to moneys, shares in government stocks, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all property which devolves upon the executor, or administrator.

[11] Thayer *v.* Thayer, 14 Vt. 107; Ladd *v.* Ladd, id. 185, and cases cited.

* [12] These restrictions are adopted from the Roman Civil Law. 4 Kent, Comm. 503; Inst. 2, 18, sec. 1, 2, 3.

*CHAPTER II.

DEFINITIONS.

1. Last will and testament.
n. 2. Testamentary guardians.
2. Codicil, an alteration of the will.
3. Devise, strictly applicable to lands.
4. The term bequest applies to both real and personal estate.
5. Swinburne's enumeration of the difficulties of definitions.

§ 2. 1. A LAST WILL AND TESTAMENT may be defined, as the disposition of one's property, to take effect after death. It has received a more comprehensive definition, as "a just sentence of our will, touching that we would have done, after our death."[1] And practically, this extent of control is more commonly asserted in such instruments; partly, because any direction given in so solemn a form, upon any subject affecting those nearly related to the testator, and in the view of such sanctions, will naturally be respected by those to whom it is addressed; and partly, perhaps, because the giver of property may annex such conditions, as he may choose, to the gift. But in most of the American states, it is believed, the testamentary power is limited to the disposition of property, and the accidental control of the donees, consequent upon the conditions and limitations annexed to the bequest. The intimate relation of parent and child, even during the infancy or minority of such child, gives no prower of control, beyond the life of the parent, except by way of recommendation, or through the instrumentality of property bequeathed.

[1] Swinb. pt. 1, sec. 2; Godolph. pt. 1, ch. 1, sec. 2; 2 Black. Comm. 499.

[2] It is common in England for parents to appoint guardians, by last will and testament, but the appointment is of no binding force, except as enforced by the conditions attached to the disposition of property. The law gives no authority to make a will for the mere purpose of naming guardians to children. The power, in connection with the disposition of one's estate, is derived from the Roman Civil

* 2. A codicil[3] is now commonly understood to be an addition to, or alteration of the last will and testament. The term itself is derived from codicillus, which is a diminutive of codex, a testament. In the history of jurisprudence upon this subject, this term has been applied sometimes in different senses, not necessary to be here enumerated, as they have now become entirely obsolete. We shall have occasion to say more of the mode of execution and construction of a codicil hereafter.

3. The term devise is applied more exclusively to a testamentary disposition of lands, and in the English courts has been regarded more in the nature of a conveyance, or appointment of particular lands to a particular devisee, than in that of a testament.[4]

4. The term bequest is applied indiscriminately both to legacies and devises, and embraces both real and personal estate,[5] and is therefore the more convenient term for general use. But it has no corresponding term to designate the person taking, like legatee or devisee, and is, on that account, not so well fitted for all contin-

Law, Domat, pt. 1, Book 2, Tit. 1, sec. 1, No. 1286; L. 1, D. de testam. tut. L. 4, 1, eod. where it is said, that fathers and mothers may name tutors to their infant children, but these may be set aside by the courts. And at No. 1289, it is said, that even testamentary tutors must be confirmed by the judge; and such seems to have been the rule of the Roman Law.

The same rule obtains at common law. For notwithstanding it is sometimes said the courts of chancery cannot remove testamentary guardians, 2 Story Eq. Ju. § 1338 *a* and cases cited; the weight of authority is otherwise, ex parte Crumb 2 Johns, Ch. 439; Andrews in re, 1 Id. 99, and cases cited; O'Keeffee *v.* Casey, 1 Sch. Lef. 106. And in the very late case of Morton in re, 33 Law J. Prob. 87, it was held that a will duly executed, but which contained only an appointment of guardians to the testator's children, was not entitled to probate, s. c. 3 Sw. & Tr. 422.

[3] Swinburne defines a codicil to be, "A just sentence of our will, touching that which any would have done after their death, without the appointing of an executor," making the last clause the only ground of distinction between a will and a codicil. Swinb. pt. 1, sec. 5, pl. 2; Godolph. pt. 1, ch. 6, sec. 2. See further the different uses of this term. Swinb. ib. pl. 9. It was considered by Swinb. (pt. 1, sec. 3, pl. 19), that the naming an executor was indispensable to the validity of a will. But that opinion has long since been abandoned in England, and never obtained in the United States. But while that idea obtained in the English courts, such an instrument was still allowed to be binding upon the administrator, under the appellation of a codicil. Hence a codicil was called an "unsolemn will." Swinb. pt. 1, sec. 5, pl. 4; 1 Williams' Executors, 7.

[4] 1 Williams' Executors, 6; Duppa *v.* Mayo, 1 Saund. 276 f, n. 4. Per Lord *Mansfield*, in Harwood *v.* Goodright, Cowp. 90.

[5] 1 Jarman on Wills, Eng. ed. 702, n. k.

gencies. It will be noticed, that many very accurate writers use the term devise, in a sense quite synonymous with bequest, especially in cases connected with charitable trusts, * but such use of that term is not precisely accurate. In one case it was made the point of the decision, that "bequeath" had been used as synonymous with "devise."[6] And in another case[7] it was held, that the words "devise," "legacy," and "bequest," may be applied indifferently to real and personal estate, if such appear, by the context of the will, to have been the testator's intention. And the word "legatee" has been construed as meaning "distributee," where that construction became indispensable to give effect to the disposing scheme of the will obviously intended by the testator.[8]

5. Swinburne's commentary on definitions is too just to encourage its extension beyond these few terms, since, as that writer very justly says, "Definitions are said to be dangerous, in law: the cause may be attributed to the multitude of different cases, the penury of apt words, the weaknesse of our understanding, and the contrariety of opinions;" and are "subject to the rigorous examination of all sorts of men, and must abide the doubtful verdict of the sharpest wits, and endure the dreadful sentence of the deepest judgments. And it is rare, if at the last, after long and superstitious revolution, one man, at least among so many subtile and captious conceits, do not espy some defect or excesse in the definition, whereby the same may be subverted. Which thing if it come to pass, then like as when the captain is slain, the soldiers are in danger to be discomfited, or as the foundation being ruinous, the building is in peril of falling; so the definition being overthrown, all the arguments drawn from thence, and whatever else dependeth thereupon, is in peril to be overturned. No marvel then if definitions be reported to be dangerous.

"But if contrary to the common course, the definition be so just, so perfect, that it cannot be justly reproved, this definition, besides that it is not perilous, it is so profitable, and so necessary, that from thence, as from the root and fountain, every discourse ought to take *his* beginning."[9]

[6] Dow *v.* Dow, 36 Maine, 211.

[7] Ladd *v.* Harvey, 1 Foster, 514. See also Homes *v.* Mitchell, 2 Murph. 228.

[8] Lallerstedt *v.* Jennings, 23 Ga. Rep. 571.

[9] Swinb. pt. 1, sec. 3, pl. 1.

*CHAPTER III.

THE EXECUTION OF WILLS.

SECTION I.

PERSONS INCAPABLE OF EXECUTING WILLS. — ALIENS.

1. The general rule is that the capacity to execute wills extends to all.
2. Aliens cannot devise real estate, but may personalty, subject to qualifications.
3. Sir E. Sugden's definition of the rights of aliens in this respect; other views.
4. A denizen may hold land acquired after becoming such.
5. Alien may take land by devise the same as by purchase, until office found, but cannot take it by descent, or other act of law.
6, 7. Who are to be regarded as aliens in this country.
8. An alien may take, and hold, and convey land, except as against the state.
9. But upon his decease the lands instantly vest in the state by way of escheat.
10. The right of aliens to hold land is exclusively a matter of state cognizance.
n. 27. The law of the several states as to aliens holding real estate.

§ 3. 1. THE persons capable of executing wills are best defined by stating the exceptions of such as labor under incapacity, all others being competent.[1]

2. Of these, aliens form one class, who by the English common law, which has been adopted in most of the American states, are incompetent to devise real estate.[2] Alien friends, by which is understood those persons owing allegiance to *sovereignties at peace with us, do not labor under any disability in regard to executing wills of personal estate. But alien enemies are incapable of making a valid will of personalty even, unless by force of special license from the National government to reside and transact business within our jurisdiction during the continuance of hostilities.[3]

*[1] Swinb. pt. 2, sec. 1.

[2] Co. Litt. 2 b. This rule is here extended to chattels real.

*[3] Vin. Ab. Devise, G. 17; Bac. Ab. Wills, B. The general rules of the Eng-

3. The subject of the rights of aliens, in regard to holding and transmitting real estate is, perhaps, of sufficient importance, in this connection, to warrant a reference more in detail to the rules of the English and American law upon the subject. The rule of the English law is thus stated by Sir E. Sugden.[4] "Aliens are incapable of holding real estate, for although they may purchase, yet it can only be for the benefit of the king; and upon an office found the king shall have it by his prerogative."[5] And an alien cannot protect himself by taking the conveyance in the name of a trustee.[6] But the interest of an alien, under a devise to trustees to sell for the benefit of himself and others, does not go to the crown.[7] The ground of these decisions seems to be, that the trust in favor of the alien is not of the land, but merely of a pecuniary obligation, which is as valid in favor of an alien as of a citizen. The Master of the Rolls, Lord *Langdale*, here said, that in regard to the land, "there is at the present time no vested interest in any alien. The vested interests are in English subjects. The interests in aliens are contingent and expectant on the determination of these vested * interests." This was a devise of lands to English subjects in trust to sell, and, after payment of mortgages, to invest the surplus moneys in the funds in trust for persons, some of whom were aliens. And the Chancellor, Lord *Cottenham*, seems to have affirmed the decree upon the same ground. His lordship said, "The incapacity of aliens to hold land is founded upon political and feudal reasons, which do not apply to money." And it is here said by the learned judge, that if the alien had an election whether to take the money or land, it could make no difference. And similar views seem to be maintained in the American courts in regard to this question. For although it has been held, that an alien cannot indirectly, and through the intervention of a trustee, become the beneficial purchaser of land, so as to hold it against the state;[8] yet a trust to

lish law in regard to the right of aliens to convey real estate by devise, or otherwise, will be found in Co. Litt. 2 b, and in other elementary works. 1 Wms. Ex'rs, 11, 12, and cases cited; 1 Jarman, Perk. ed. 50, 51; 1 Jarman, Eng. ed. 1861, 35, 37, 60, 61, 62, 63, 64.

[4] Vendors & Pur. ch. 20, sec. 11, p. 564.

[5] Co. Litt. 2 b; Dumoncel *v.* Dumoncel, 13 Ir. Eq. Rep. 92.

[6] The King *v.* Holland, Aleyn, 14; Sty. 20, 40, 75, 84, 90, 94; 1 Ro. Ab. 194, pl. 8.

[7] Du Hourmelin *v.* Sheldon, 1 Beavan, 79; S. C. 4 My. & Cr. 525.

[8] Leggett *v.* Dubois, 5 Paige, 114.

sell land and to pay over the proceeds to an alien, or hold the same for his benefit, is valid.[9] The last case was where an attorney, in the collection of a debt for a partnership of which the members were aliens, accepted land in payment, and took the conveyances to himself on account of the alienage of his clients, intending to convert the land into money and remit to them, but died before effecting a sale. His heirs sold the land supposing it belonged to them, and it was considered that they held the avails of the sale, being money, in trust for the partners, and that the surviving partner might recover the same, as funds belonging to the partnership.[10] And where the testator conveyed all his estate, real and personal, to his executors, as trustees, out of the proceeds to pay all, except necessary expense of administration, to an alien by name, it was held to be a mere personal legacy, and that the alien might well take and hold it.[11]

* 4. "If an alien be made a denizen by the king's letters patent he is then capable of holding land purchased after his denization."[12] "And if after the purchase of the estate by the alien, and before office found the king make him a denizen by letters patent and confirm his estate, it is thereby rendered valid, as the estate is not in the crown until office found."[13]

5. It seems to be well settled at common law,[14] and has been repeatedly decided in this country, that an alien may take land by devise the same as by purchase, and hold the title subject to the right of the sovereignty to procure an escheat or forfeiture, by information and office found.[15] It is held in some of the states that

[9] Anstice *v.* Brown, 6 Paige, 448.

[10] See Mooers *v.* White, 6 Johns. Ch. 360; Wright *v.* Methodist Episcopal Church, 1 Hoff. Ch. Rep. 222, 224.

[11] Craig *v.* Leslie, 3 Wheaton, 563.

[12] Co. Litt. 2 b; 7 & 8 Vict. ch. 66, sec. 6–11.

[13] Fourdrin *v.* Gowdey, 3 My. & Keen, 383. This case was three times argued before Sir *John Leach*, M. R., and grave doubt seems to have been entertained whether the English sovereign could confirm by letters patent to one made denizen the title of his before acquired lands; but upon the authority of the early cases, it was regarded by the learned judge as unquestionable, that he might do so. Anony. Goulds. 29, pl. 4; 1 Leon. 47, pl. 61; 4 Leon. 82, pl. 175, where it appears that letters patent of denization contained such clauses, as early as the 20 Eliz.

[14] This will be found to be the uniform current of the English decisions from the time of the Year Books to the present time. 11 Hen. 4, 26; 14 Hen. 4, 20; Co. Litt. 2 b; Pow. Dev. 316; 10 Mod. 113–125; Dyer, 2 b, n.

[15] Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603; Sheaffe *v.* O'Neil, 1;

the estate of a deceased alien in land will escheat to the state without office found, since it cannot pass to the heir, as an alien can only take land by purchase and not by act of law.[16] So an alien cannot be tenant by the curtesy, as that is an estate which vests by act of law.[17] And even where the husband being an alien makes the preliminary declaration of intention to become a citizen before the decease of * the wife, and completes his naturalization afterwards, he is not entitled to hold her land by curtesy.[18]

6. The settled doctrine in this country is, that a person born here, and who left the country before the declaration of independence and never returned here, became an alien, and incapable of taking land subsequently by descent.[19] The point of time at which the American ante nati ceased to be British subjects, differs in this country and England, as established by the decisions of the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace, 1783, and ours that of the declaration of independence.[19] But a British subject and his children, remaining here during the Revolutionary war under British protection, and leaving with their armies; or upon the ratification of peace, and never returning; are aliens as to our government, and cannot take lands in the State of New York by inheritance.[19]

7. By the treaty of 1783, all those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown, and those who adhered to the British crown were deemed subjects of that crown.[20] It is held,

Mass. 256, where it was held, that the alien may convey his estate and his grantee may maintain an action in his own name, declaring upon his own right in fee. But the question does not seem to have been much considered here.

[16] Rubeck *v.* Gardner, 7 Watts, 455. See Mooers *v.* Wright, 6 Johns. Ch. 360.

[17] Reese *v.* Waters, 4 Watts & Serg. 145.

[18] Foss *v.* Crisp, 20 Pick. 121. *Putnam, J.*, here said, "It is very clear that the alien himself does not become a citizen until he is *actually naturalized*. Until that time the common law disabilities of alienage continue, except as they are relaxed in favor of his widow and children by the statute of the United States," by which an alien dying after having made the preliminary declaration, as to his widow and children, are to be considered as citizens of the United States.

[19] Inglis *v.* The Trustees of The Sailor's Snug Harbor, 3 Peters, U. S. R. 99; Shanks *v.* Dupont, 3 Pet. U. S. R., 242.

[20] Shanks *v.* Dupont, 3 Pet. U. S. R., 242, 247. It is here held, that marriage of the wife who is a citizen with an alien husband does not affect her allegiance, but a permanent removal out of the country is an effectual renunciation of her allegiance.

that British subjects born before the Revolution, are equally incapable of inheriting land here, as if born since.[21] By the ninth article of the treaty of 1794, with Great * Britain, it is provided that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and that neither they nor their heirs or assigns shall, so far as respects the said lands, and the legal remedies incident thereto, be regarded as aliens." This was held to extend to a married woman who left this country with her husband, a British officer, upon the ratification of peace, and never returned.[22]

8. The rule seems to be clearly established that an alien may take land by purchase or devise, and hold the same in fee, or any lesser estate, against all the world except the state, and against the state until after office found, or some equivalent act by the legislature.[23] And the rule in this respect seems to be the same, whether it be an alien friend, or an alien enemy.[24] And many of the cases in the American states hold that the alien may convey a defeasible estate, subject to be divested by the same proceedings which will divest the estate of an alien.[25]

9. But Chancellor Kent thus states the law, in regard to the descent of lands held by an alien at the time of his decease: "The law will not enable him to transmit by hereditary descent." "An alien has no inheritable blood," and upon his death, "the land instantly, and of necessity, without any inquest of office, escheats to the people."[26]

*10. This matter of the right of aliens to hold land in the several states, although a question affecting national allegiance, which is under the exclusive jurisdiction of the national government,

[21] Blight's Lessee *v.* Rochester, 7 Wheaton, 535.

[*22] Shanks *v.* Dupont, 3 Peters, U. S. R. 242, 249; Orr v. Hodson, 4 Wheat. 453; Blight's Lessee v. Rochester, 7 Wheat. 535.

[23] Craig *v.* Leslie, 3 Wheaton, 563; Doe d. *v.* Robertson, 11 Wheat. 332. See also, Inglis *v.* Sailors' Snug Harbor, 3 Peters, U. S. R. 99; Shanks *v.* Dupont, id. 242; Craig *v.* Radford, 3 Wheat. 594; Jackson *v.* Beach, 1 Johns. Cas. 399; Jackson *v.* Lunn, 3 Johns. Cas. 109; Dudley *v.* Grayson, 6 Monroe, 260.

[24] Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch. 603.

[25] Marshall *v.* Conrad, 5 Call, 364; Sheafe *v.* O'Neil, 1 Mass. 256.

[26] Mooers *v.* White, 6 Johns. Ch. 360, 366. See also, Collingwood *v.* Pays, 1 Sid. 193; 1 Vent. 413; 1 Plow. 229 k, 230 a.

seems to have been regarded as a matter wholly within the control of the state legislatures. Hence, at a very early day, it was not uncommon for special statutes to be passed in the different states, allowing aliens to hold lands. And there can be no question of the entire validity of such laws, and that the several states may allow resident aliens to hold lands within the state, upon such terms as they see fit to prescribe. And there is no question, we apprehend, that the several states may by general laws allow all resident aliens to hold and convey lands within their limits, upon such terms as they deem proper, without naturalization. But such acts would be in conflict with the general national policy of most European nations. And so is the general policy of this country, in placing no limits or restrictions upon free access, ingress, and immigration into all parts of our widely extended country. We are now passing through a national crisis which may have the effect to restrict this unrestrained license of immigration, and to qualify the rights of the states in some respects, in relation to the right of aliens to hold lands under license from state authority.[27]

[27] In some of the states statutes have been enacted allowing aliens to hold land without restriction, while in others, residence, or that and the oath of allegiance is required. In Indiana (1 Rev. Stat. 1852, § 1, p. 232), it is held that an Indian, as he may become a resident of the United States, although not a citizen, may therefore transfer real property by devise. Parent *v.* Walmsley's Adm. 20 Ind. 82. And it seems to be the generally received law in almost all the states, that aliens may hold and convey land as against every one but the state, and that they may even maintain an action for its recovery. M'Creery *v.* Allender, 4 Har. & McH. 409; Bradstreet *v.* Supervisors, 13 Wend. 546; Scanlan *v.* Wright, 13 Pick. 523; People *v.* Conklin, 2 Hill, 67; Waugh *v.* Riley, 8 Met. 295; Ramires *v.* Kent, 2 Cal. 558; Fiott *v.* Com. 12 Gratt. 564. A statute allowing aliens to hold lands by purchase will not enable them to take by descent. Colgan *v.* McKeon, 4 Zab. 566. In Louisiana aliens may inherit and transmit real estate by descent. Richmond *v.* Milne, 17 Louis. 312. In South Carolina, it has been held, that under the statutes of that state, upon the decease of an alien leaving an alien widow residing in the state, his land will not escheat, but if there be no heirs capable of taking, it will all go to his widow, but will go to his legal heirs, being naturalized, in preference. Ford *v.* Husman, 7 Rich. 165; Keenan *v.* Keenan, 7 Rich. 345. The State of New York early made laws allowing any alien resident in any of the United States, by making a declaration of intention to obtain naturalization in due course, capable of holding and transmitting by devise or descent, or by other means, the title to real estate, under certain qualifications, which indulgence by subsequent statutes has been very much extended. See 2 Kent, Comm. 52, et seq.; Currin *v.* Finn, 3 Denio, 229; Priest *v.* Cummings, 16 Wend. 617; McLean *v.* Swanton, 3 Kern. 535.

* SECTION II.

DISABILITY FROM INFANCY.

1. At what age infants may dispose of property, by last will and testament.
2. Statutory provisions upon the subject, in the different states.
3. Ratification of will, made before age of capacity, must be in prescribed form.
4. Mode of computing the requisite age.

§ 4. 1. THE age at which persons shall be allowed to dispose of their property, real or personal, by last will and testament, is now determined by statute, both in England, and the United States.[1] In England, until 1838, in conformity to the rule of the Roman Civil Law, upon this subject, males, at fourteen, and females, at twelve, were held competent to make wills in regard to personal estate.[2] This rule was established, in the English * ecclesiastical courts, at an early day; and as the exclusive primary jurisdiction, in matters of probate and the settlement of estates, until a recent period,[3] resided in those courts, the * common-law courts, and the

[1] 1 Vict. ch. 26, sec. 7; 20 & 21 Vict. ch. 77. And the substance of the provisions of the English statute upon this subject has been enacted in most of the American states, either before or since the date of the English statute.

[2] Swinb. pt. 2, sec. 2, pl. 6; Godolph. pt. 6, ch. 8, sec. 8. There is however some contrariety of statement, among English writers upon the subject. Co. Litt. 89 b, note 83, by Hargrave; 1 Williams' Ex'rs, 15, n. (o); Swinb. pt. 2, sec. 2, n. (f). But upon the whole there seems no ground to question, the rule was firmly established in England, as laid down in the text, previous to 1838. 1 Vict. ch. 26, sec. 7.

[*3] In the year 1857, the British parliament made a thorough revision of their probate jurisdiction, and established an independent court for that purpose, the judge being of civil appointment, and being also the judge of the Court of Divorce and Matrimonial Causes. This created a very important and radical change in regard to that jurisdiction. And as indicating the importance attached to that jurisdiction in that country, it may not be improper to state, that the late Sir *Cresswell Cresswell*, at the time one of the most esteemed of the common-law judges in Westminster Hall, accepted the office under the new act, which gave him the same rank and precedence, as that of the puisne judges in the superior courts of Westminster Hall, the same salary and retiring pension, and made him one of the Judicial Committee, whenever he is a member of the Privy Council. The successor of Sir *Creswell Creswell*, Baron *Wilde*, is one of the most acceptable of the puisne judges in Westminster Hall.

It is curious too, as affording a marked, and gratifying contrast, with the more

Court of Chancery, conformed their rules upon the subject to that which obtained in the ecclesiastical courts.[4]

common practice in this country, of committing the probate administration, especially in the rural districts, to unprofessional judges, who are too often the mere footballs of party politics. A judicious change, in this respect, which has been attempted in some of the states, by which an attorney and counsellor of a high grade should receive the appointment of probate judge, for the whole state, or an extensive district, which should require his entire capacity for service, and entitle him to an adequate salary; and should be also a permanent appointment, would be productive of more advantage practically, than any other reform in the judiciary, which has been attempted, for the last half century. The members of our legislatures are not sufficiently impressed with the importance of committing this jurisdiction to competent hands. All the property of a state, about once in a generation, or the period of thirty years, has to pass through the probate court, in some form. The importance of the jurisdiction, in its entire scope, is therefore infinitely beyond that of the chancery or common-law courts, if no appeal were allowed. And these appeals are attended with great expense and delay, much of which might be saved by the appointment of competent men as probate judges. And the mere allowance of an appeal to the higher courts, in the last resort, affords no adequate security, that the detail of the administration will be wise and just. It is the daily progress of judicial administration, which is required to be in competent and faithful hands. It is undoubtedly an important and indispensable desideratum, that the court of last resort, in all matters, be entirely reliable, in order to sustain that confidence which, in all states, is so necessary to produce and maintain quiet and good order. But while we place so much reliance upon this, we ought not to forget, that in the subordinate tribunals of the state, one judge, entirely competent, can accomplish more, and far more satisfactorily to the interests of those concerned, than ten, who are deficient in the proper training for the place. The probate administration is a department of the law, which in itself demands the study of a lifetime, for its mastery. And it is one which, from want of thorough study and extensive experience, the judges of our superior courts are not always entirely competent to administer. There should be at least one of the judges of the superior courts trained, in vacation, in the trial of probate causes. And if the facts, in this class of causes, were allowed to be definitively settled, in the probate courts, by the intervention of a jury, as in common-law actions, in the trial terms, and as is now done in England and some of the American states, in probate causes, it would be an improvement of vast consequence in its practical benefit. We trust the example of the British parliament, in this respect, will not be lost upon the American legislatures.

[4] Smallwood *v.* Brickhouse, 2 Mod. 315. Here it was moved, in the King's Bench, that a writ of prohibition issue to the Prerogative Court, because that court proceeded to the proof of the will of a person under the age of sixteen years. And for authority, Lord Coke, 1 Inst. 89 b, was cited, where it is said, "that at eighteen years of age he may make his testament and constitute executors." But the court said, the proof of wills and the validity of them doth belong to the ecclesiastical courts; and sometimes they allow wills made by persons of fourteen years of age; and the common law hath appointed no time, it depends wholly

2. By the present English statute,[5] it is provided, "that no will made by any person under the age of twenty-one years shall be valid." There is manifested of late, in this country, a disposition to raise the age of legal capacity to execute wills, to that of legal majority. This rule already obtains in a large number of the American states. But in a considerable number of the states infants are still allowed to dispose of their * property by will. It could answer no good purpose to recapitulate the several statutory provisions, in the different states, upon this subject. They are of easy access to all interested in them, and are subject to constant change, from year to year. The English rule of the ecclesiastical courts obtained in many of the states until a comparatively recent period.[6]

3. The English text-writers lay down the rule, without hesitation or qualification, that the ratification of a will after the testator arrives at the age required to execute a valid will, although executed before that age, renders it a valid instrument.[7] But it is very questionable how far a will executed, while the testator is under legal disability, can be regarded as a valid instrument, from

upon the spiritual law. Hyde *v.* Hyde, Prec. Ch. 316; Ex parte Holyland, 11 Ves. 10, 11; 1 Williams' Ex'rs, 15, note (l); 2 Bl. Comm. 497.

[5] 1 Vict. ch. 26, sec. 7.

[6] Deane *v.* Littlefield, 1 Pick. 239. By statute, the right to dispose of estate, both real and personal, is now limited to persons of full age, in Massachusetts, Vermont, New Hampshire, Maine, Ohio, Indiana, New Jersey, Kentucky, Florida, Virginia, Alabama, Pennsylvania, Delaware, Michigan, and a considerable number of the other states probably, and the tendency is largely in that direction. In some of the states a distinction is made between personal and real estate. Thus in Rhode Island, Virginia, Arkansas, Missouri, and North Carolina, the age for making wills of real estate is fixed at twenty-one, and for disposing of personalty, in that mode, at eighteen. And in Connecticut at twenty-one for real estate, and seventeen for personalty. In some of the states a distinction is made between males and females, as to the age of testamentary capacity. In Vermont females reach their legal majority, for all purposes, at eighteen years of age; and in Maryland testamentary capacity is fixed at twenty-one in males and at eighteen in females. In Illinois the same limits are fixed as to real estate, and as to personal estate, both males and females may make testamentary dispositions at seventeen. And in New York all persons are required to have reached the age of twenty-one in order to dispose of real estate, but males at eighteen and females at sixteen may dispose of personalty, by will. 4 Kent, Comm. 506,507; 1 Jarman, Perkins' ed. 29, 30. In Texas infants are not held competent to execute a valid will. Moore *v.* Moore, 23 Texas, 637.

[7] 1 Wms. Ex'rs, 16; Swinb. pt. 2, sec. 2, pl. 7; 7 Bac. Ab. Wills, B. 300.

the mere fact of its subsequent parol ratification by the testator, after the removal of such disability. * It would seem, upon principle, that republication, according to the requirements of the existing statutes, would be necessary. And what Swinburne [8] says, "if after they have accomplished these years of fourteen or twelve, he or she do expressly approve the testament made in their minority, the same by this new will and declaration is made strong and effectual," evidently has reference, exclusively, to the disposition of personalty, which was not required to be done with any particular formalities, until the late statute.[9] We think it safe to lay down the rule, that where a will is required to be in writing and executed before witnesses, in order to its validity, and is thus executed before the testator arrives at the required age, it cannot be rendered valid, after the testator arrives at full age, except by republication with all the prescribed formalities.

4. There has been a good deal of discussion, first and last, in regard to the proper mode of computing time. In some of the early cases, and by the text-writers, a distinction is made between computing from a particular event, on a given day, and from the particular day. And this refinement has been carried so far, as to attempt to establish a distinction between a period, as a month, or year, to be computed from the *date*, or the *day* of the date of the instrument, as if in the one case the day were excluded, and in the other not.[10] But we apprehend, at the present day, that all these refinements are laid aside, and that where a term of time is allowed for the accomplishment of any required duty, as a general thing, the full term is to be computed, exclusive of the day from which it is reckoned. Thus, if a period of accumulation is reckoned by years, it will be * completed upon the recurrence of the anniversary of the day from which it is computed.[11]

* [8] Pt. 2, sec. 2, pl. 8.

[9] 1 Vict. ch. 26.

[10] Co. Litt. 466; Clayton's case, 5 Co. Repts. 1. See also, Dyer, 218; Bacon *v.* Waller, 3 Bulstr. 203; Osborne *v.* Rider, Cro. Jac. 135; Llewelyn *v.* Williams, id. 258; Hatter *v.* Ash, 1 Ld. Ray. 84.

* [11] Gast *v.* Lowndes, 11 Simons, 434. This was where a fund was directed yb the testator to be accumulated for twenty-one years from his death, and it was held, the twenty-one years were to be reckoned exclusive of the day of the death. So too where the legatee is required to perform a condition within a prescribed period after the death of the testator, the day of the death is excluded. Lester *v.* Garland, 15 Ves. 248. And this is unquestionably the usual mode of computing

But there seems to be one remarkable exception. The early case cited by Lord *Holt*, Ch. J.,[12] wherein his lordship said, "it has been adjudged, that if one be born on the first of February at eleven a clock at night, and the last day of January in the one and twentieth year, at one of the clock in the morning, he makes his will, and dies; yet such will is good, for he then was of age," seems to have maintained its ground, for nearly two centuries, without question. The rule is so laid down in Swinburne;[13] in Blackstone's Commentaries;[14] in Kent's Commentaries;[15] in Bingham on Infancy;[16] and by Mr. Justice *Metcalf*, in his valuable commentaries upon contracts.[17] In addition to this great weight of authority, the same rule has been adopted by some of the American courts.[18] To all this we may add, that the same rule is promulgated, in the latest English edition of Mr. Jarman's valuable treatise upon Wills.[19]

* We are happy to say that this presents an array of unbroken authority, which will not be liable to be affected by any dissent from us. But we feel compelled to declare, that the rule thus established in computing the age of capacity, seems to us to form a very singular departure, both from all other legal modes of computing time, and equally from the commonly received notions upon the subject. We cannot comprehend why this reckoning should be carried back any further, in computing a period from one's birth, than in computing the same period from his death. But to carry it back two full days beyond the real date, as the computation of the age of majority does, seems scarcely less than a blunder; which, for the good sense of the thing, we should be glad to see set right. It has also been decided that one attains his twenty-fifth year at the end of his twenty-fourth year.[20]

the period for the performance of any duty. Sir *William Grant* names many such cases, in his opinion in the case last cited, and many others will readily occur. Indeed, it would be difficult to find many where that rule is not now followed.

[12] Fitzhue *v.* Dennington, 6 Mod. 259; s. c. 1 Salk. 44.

[13] Pt. 2, sec. 2 pl. 7.

[14] Vol. 1, p. 463.

[15] Vol. 2. p. 233.

[16] Page 2.

[17] 20 Am. Jurist, 252.

[18] State *v* Clark, 3 Harring. (Del.) 557; Hamlin *v.* Stevenson, 4 Dana, 597.

[19] 1 Jarman, Eng. ed. 1861, 39. See also, 8 Vin. Ab. Dev. G. pl. 20; Herbert *v.* Torball, 1 Sid. 162; 7 Bac. Ab. Wills, B. 300.

[20] * Grant *v.* Grant, 4 Y. & C. 256.

SECTION III.

DISABILITY FROM COVERTURE.

1. Coverture is fast becoming no disability in regard to making wills.
2. By the Roman Civil Law married women labored under no such disability.
3. That privilege has never been conceded by the English law.
4. Married woman may execute will by consent of husband.
5. She may dispose of choses in action by will, without consent of the husband.
6. So she may dispose of chattels, held for her sole and separate use.
7. So also where her personalty is secured to her separate use.
8. The husband's consent must be to the very will and not generally. Is revokable.
9. Such consent will not apply to subsequently acquired property.
10. Married woman may convey equitable, but not legal title of her real estate.
11. Where the husband is civiliter mortuus the wife may make her will as a feme sole.
12. The law here, in this respect, is approaching the rule of the Civil Law.
13. In Massachusetts married woman may dispose of any estate by will, held by trustees for her sole use.
* 14. In many of the states testamentary power is expressly conferred upon married women.
15. In New York it is expressly denied; constructions which obtain there.
16. General testamentary powers how construed in different states.
17. Married woman may execute valid will in performance of a power.
18. By virtue of an ante-nuptial power she may execute a devise in favor of the husband.
19. Husband's assent to will of wife may be either express or implied.
20. Married woman may dispose of real estate in Connecticut with consent of her husband.

§ 4 *a*. 1. COVERTURE, in many of the American states, still interposes a disability in regard to the execution of a will. But the tendency is now, and has been for many years, so strong in the direction of removing all the property disabilities attaching to married women, that we should scarcely feel justified in occupying much space in pointing out the character and extent of those testamentary disqualifications which have formerly obtained here, or in England.

2. It is well understood, that by the Roman Civil Law, a married woman possessed the same testamentary capacity in all respects as a feme sole.[1]

*[1] 1 Wms. Ex'rs, 47; 2 Bl. Comm. 497.

3. But by the laws of England no such power has ever been conceded to that class of persons.[2] But there are so many exceptions to the general disqualification on the ground of coverture, that it seems to be of no practical importance anywhere.

4. And by the English law the wife may make a valid will of personalty by the consent of her husband. But this is upon the condition that he survive her, and do not elect, after her death,* to disaffirm his consent thus given. The will thus made, by the wife in form, seems to be, in fact, more the act of the husband than of the wife. But such are the decisions of the English courts.[3] The will of a married woman, when presented for probate in the ecclesiastical courts, is treated as a mere nullity and would not even be propounded for probate.[4] But where it is alleged to have been made with the assent of the husband the ecclesiastical courts assume jurisdiction.

5. There are many other exceptions to the testamentary incapacity of married women in the English law. Thus, if the wife be executor, and as such entitled to personal chattels, not yet reduced into possession, she may dispose of the same by will, without the assent of the husband, since he had acquired no vested interest in them. But if the wife had reduced such chattels to which she was entitled as executor, to possession, the right of the husband attaches, and the wife could not dispose of them by will.[5]

6. So too, if the chattels come to the separate use of the wife, during coverture, or are secured to her separate use, independent of all control of the husband, she may dispose of the same by will during coverture. Lord *Thurlow* here said, "I have always

[2] Married women are expressly excepted from the Statute of Wills, 34 & 35 Hen. 8, ch. 5, and it is provided in the present English statute, 1 Vict. ch. 26, sec. 8, that "no will made by any married woman shall be valid except such will as might have been made by a married woman before the passing of this Act."

[3] Tucker *v.* Inman, 4 M. & G. 1049, 1076. *Tindal*, Ch. J., here defines many of the exceptions to the testamentary disability of married women.

[4] *Tindal*, Ch. J., in Tucker *v.* Inman, supra.

[5] Tucker *v.* Inman, supra; Scammel *v.* Wilkinson, 2 East, 552; 1 Wms. Ex'rs, 48; Lord *Thurlow*, Chancellor, in Hodsden *v.* Lloyd, 2 Br. C. C. 534, 543.

[6] Fettiplace *v.* Gorges, 1 Ves. jr. 46. Lord *Eldon*, in Rich *v.* Cockell, 9 Ves. 375. Savings out of an allowance made by the husband for the separate maintenance of the wife are, in equity, treated as her separate estate of which she may dispose by will. Brooke *v.* Brooke, 25 Beav. 342. But savings out of pin-money, are said to revert to the husband, if not applied to that particular use, but the distinction seems to be without much foundation. Jodrell *v.* Jodrell, 9. Beav. 45;

* thought it settled, that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it." . . . . "Upon the cases, I have always taken this ground, that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents."

7. So too, where by any sufficient instrument executed by husband and wife before marriage, the separate control of the wife's personalty is secured to her during the coverture, or she retains a special power to dispose of her estate, real or personal, by will, she may exercise that power during the coverture, independent of any assent on the part of the husband.[7]

8. The nature of the required consent on the part of the husband, in order to the validity of the wife's will, it may be of some importance further to explain. It is said, that a general assent on his part to his wife making a will is not sufficient. It should be shown that he has consented to the particular will.[8] And it is said the husband shall be examined in regard to his consent at the time of the probate.[9] He may therefore revoke his consent at any time before the probate, either before or after the decease of the wife.[10] The consent of the husband may be either express or implied; but if once given it cannot be impliedly recalled, it should be done in a formal manner. And if after the decease of the wife the husband assent to the will even by implication, as by expressing gratification at her selection of an executor, or by recommending him to particular places to procure suitable preparations for the burial, he cannot, after he has thereby induced the executor to act under the instrument, be allowed to recall his assent.[10]

* 9. It is said therefore that the assent on the part of the husband is nothing more than a waiver of his right to be administrator of his wife's goods, whereby, after the payment of her debts, he is allowed to retain the balance himself. It can therefore only give

Howard *v.* Digby, 2 Cl. & Fin. 634; *Wood*, V. C., in Barrack *v.* M'Culloch, 3 Kay & J. 114. And the wife may dispose of the assets or accumulations of property conveyed to trustees for her separate use, whether the same be real or personal estate. 1 Jarman, 34, 35.

[7] Rich *v.* Cockell, 9 Ves. 375; Hodsden *v.* Lloyd, 2 Br. C. C. 534.

[8] Rex *v.* Bettersworth, 2 Strange, 891.

[9] Henly *v.* Phillips, 2 Atk. 48.

[10] 1 Wms. Ex'rs, 48; Anony. 1 Mod. 211; Brook *v.* Turner, 2 Mod. 170, where the exceptions to the consent of the husband are very fully explained.

validity to the will in the event of the husband surviving. And as his consent is required to the particular will, it does not pass subsequently acquired property.[11]

10. By the English law no contract will be sufficient to enable a wife to pass the legal title of her real estate, by an * ordinary will; but it will operate only as an appointment of an use, and the equitable interest only will pass under the instrument, but the legal title must be obtained from the heir.[12]

* [11] 1 Wms. Ex'rs, 49. See also, Stevens *v.* Bagwell, 15 Ves. 139, 156; Price *v.* Parker, 16 Simons, 198. The husband's consent to the wife's disposition of her personal estate, including choses in action, may be given after her death, or by contract, before. Wagner *v.* Ellis, 7 Penn. St. 413. But to render a testamentary disposition of her estate by the wife valid, as against the husband's interest, his consent to the particular will must be given; and it is said should be given, at the time the will is proved. George *v.* Bussing, 15 B. Monr. 558; Cutter *v.* Butler, 5 Foster, 357. This case contains a most thorough and learned discussion of the law upon this question, by Mr. Justice *Bell*, the present chief justice of the court, the substance of which is embodied in the following propositions:

A married woman, by the assent of her husband, may make a will of real or personal chattels, or choses in action, in which the husband has an interest, or of personal property, of which he is sole owner, and her bequests will be valid.

Such a will operates, as to the husband's interest, or property, as a gift from him.

The assent of the husband, once given to the wife's will, after her decease, is binding, and cannot be revoked.

The probate of the will is conclusive, in regard to the capacity of the testator, being a feme covert, to make the will, and of the husband's consent.

In Mississippi, where by statute married women have no power to bequeath their personal estate, it is held they may do so, the same as any other person, by consent of their husbands. Lee *v.* Bennett, 31 Miss. 119. But in Pennsylvania, it is held, the husband must assent to the particular will, and that a general license to make a will is not sufficient. Kurtz *v.* Saylor, 20 Penn. St. 205. The will of a feme sole is annulled by her subsequent marriage; and is not revived by the death of the husband, the wife surviving. Garrett *v.* Dabney, 27 Miss. 335. A married woman, by consent of her husband, may bequeath her choses in action to him. Burton *v.* Holley, 18 Ala. 408.

* [12] Churchill *v.* Dibbin, 8 Sim. 447, in n.; Dillon *v.* Grace, 2 Sch. & Lef. 463. We shall have occasion to discuss the right of married women to convey real estate by virtue of a power in another place. See 1 Jarman, Eng. ed. 1861, 33, and notes. In the very recent case of Taylor *v.* Meeds, 11 Jur. N. S. 166, it was decided by the Lord Chancellor, that a devise of real estate to trustees, in trust, for the sole and separate use of a married woman and her heirs, gives her the same power of disposition by deed or will over the equitable fee as she would have had if she were a feme sole. And in Hall *v.* Waterhouse, id. 361, Vice Chancellor *Stewart* held that a devise of real estate, without the interposition of trustees, to

11. And where the husband is civiliter mortuus, as where he is banished for life, by act of parliament,[13] or where he is attainted,[14] the wife may make her will and dispose of her estate, both real and personal, the same as if the husband were dead. And the same rule holds in regard to the wife of an alien enemy,[15] or of a felon convict, transported for life.[16]

12. The law of the American states, in regard to the separate estate of the wife being exclusively under her control, and subject to any disposition on her part, the same as if she were sole, is fast verging toward the rules of the Roman Civil Law. It is held in some states, that the husband has no claim, as husband, upon the personal estate of the wife, after her decease.[17] In most of the more important and commercial of the states, the wife's right to dispose of her estate, by will, both real and personal, is recognized to the fullest extent by statute.

13. In Massachusetts, it was settled under former statutes, that a feme covert may dispose of her estate by will, where it was conveyed to trustees for her sole use, whether before or during coverture.[18]

14. In many of the states, either by general statutory * provisions, including all persons above a certain age, who are compos mentis, which is construed to extend to married women, or by special statutory provisions to that effect, the testamentary capacity of married women is maintained to the fullest extent.[19]

a married woman and her heirs for her separate use, free from marital control, gave her a right of disposition, by will, of the equitable fee, in like manner as if she were discoverte. The learned judge here argues, that, in such case, the wife may convey all the title which exists in her, or for her benefit. "But where the property is absolutely the property of the wife (the fee simple of freehold estates), to her own separate uses, a will made by her is valid. Either as an execution of a power, or, if there be no power, as a disposition, during the coverture, of the property belonging to her separate use," citing Dingwell *v.* Askew, 1 Cox, 427.

[13] Countess of Portland *v.* Prodgers, 2 Vern. 104. The court were of opinion "the wife might in all things act as a feme sole, and as if her husband was dead."

[14] Newsome *v.* Bowyer, 3 P. Wms. 37.

[15] Deerly *v.* Mazarine, 1 Salk. 116.

[16] Re Martin, 2 Roberts. 405. But banishment or transportation for a time will not have this effect. Co. Litt. 133 a; 1 Jarman, ed. 1861, 35, n.

[17] Heirs of Holmes *v.* Admr's of Holmes, 27 Vt. 765.

[18] Holman *v.* Perry, 4 Met. 492.

*[19] The statutes of the following states are believed to confer full testamentary powers, either expressly or by clear implication, with the qualification in some instances that the husband shall not be wholly deprived of all estate by curtesy in

15. In New York, married women were expressly excepted from the statute conferring general testamentary power. The surrogate therefore had no power under the former statute to permit the will of a married woman to be proved.[20] But in this state a married woman might formerly make a valid will, by the written authority of her husband, which was taken away by the Revised Statutes.[21] But these restrictions are removed by later statutes. The will of a married woman made as authorized by the law of her domicil will be valid as to her personalty in this state.[22]

16. There seems to be some difference of construction, in the different states, in regard to testamentary capacity, where the statute is general, without naming married women. In some of the states they are held to be excluded, by way of construction,[23] and in others the opposite construction obtains.[24]

* 17. Married women having the right to dispose of estate under a power, may do so, in the American states, even where the general testamentary power is denied them.[25] And where a married woman has power, by marriage settlement, or any other valid contract, to dispose of her estate, by will, or testamentary appointment,

the wife's real estate, and in some few cases securing to the husband a certain proportion of the personal estate, unless where the will is made with his assent. New Hampshire, Vermont, Massachusetts, Ohio, Connecticut, New York, Indiana, and some others. 1 Jarman, Perk. ed. 35. In Noble *v.* Enos, 19 Indiana R. 72, it was held, that, under the laws of that state, married women may dispose of their separate real estate without the assent or concurrence of their husbands, and by parity of reason of personalty.

In the following states the testamentary right of married women has been wholly denied or greatly restricted: Virginia, South Carolina, Delaware, Pennsylvania, Missouri, Mississippi, Rhode Island, New Jersey, and Kentucky. Ib. But in many of the latter, this disability has been either removed or greatly modified by later statutes. See also, Marston *v.* Norton, 5 N. H. 205; Allen *v.* Little, 6 Ohio, 65; Fisher *v.* Kimball, 17 Vt. 328.

[20] 2 Rev. Stat. 56, sec. 1; id. 60, sec. 21; Moehring *v.* Thayer, How. App. Cas. 502; s. c. 1 Barb. Ch. 264; Wadhams *v.* Am. Home Missionary Society, 12 N. Y. App. 415.

[21] 2 Rev. Stat. 60, sec. 21.

[22] Matter of Stewart, 11 Paige, 398.

[23] West *v.* West, 10 S. & R. 446.

[24] Allen *v.* Little, 5 Ohio, 65.

[25] Heath *v.* Withington, 6 Cush. 497; 4 Kent, Comm. 506; Osgood *v.* Breed, 12 Mass. 525, 530; West *v.* West, 10 S. & R. 446; Wagner *v.* Ellis, 7 Penn. St. 411; Wagner's Estate, 2 Ashmead, 448; Lancaster *v.* Dolan, 1 Rawle, 231; Van Wert *v.* Benedict, 1 Bradf. Sur. Rep. 114.

she can only do so by an instrument of that particular character, and it must be proved as a will, in the appropriate probate jurisdiction, before it can have any valid operation.[26] And where, by antenuptial agreement, property is appropriated to the sole and separate use of a married woman, she may dispose of the same by will, although no such power is expressly given by the agreement.[27]

18. A feme covert may execute, by a will in favor of her husband, a power given or reserved to her, while sole, over her real estate. And where the wife, before marriage, entered into an agreement with her intended husband, that she should have the power, during coverture, to dispose of her real estate by will, and she afterwards devised the whole of her estate to her husband, this was held a valid disposition of her estate in equity, and the heirs at law were decreed, to convey the legal estate to the devisee.[28]

19. The evidence of the husband's assent may be implied from the will being in his handwriting.[29] And evidence that * the husband agreed the wife should dispose of the property she had before marriage, by will, both before and during the coverture; and that he made no objection to the proof of the will, and that he pointed out the articles, at the time of the inventory, and interposed no objection to the executor's taking them, was held competent evidence of his consent to the will.[30]

20. A married woman, being desirous of making a disposition of her real estate, to take effect after her decease, united with her husband in the execution of a deed of the same to a trustee, authorizing him to make a sale thereof, and out of the proceeds to pay certain sums to particular individuals, and the remainder to her legal representatives. The husband received the deed, after its execution, upon his express promise to deliver it to the grantee, at his wife's decease, if that should occur before his own, which being

[26] Heath *v.* Withington, 6 Cush. 497, 500; Osgood *v.* Breed, 12 Mass. 533, 534; Picquet *v.* Swan, 4 Mason, 461, 462; Newburyport Bank *v.* Stone, 13 Pick. 420; Holman *v.* Perry, 4 Met. 492, 496, 498.

[27] Michael *v.* Baker, 12 Md. 158. The law will not presume the continuance of coverture, in the case of a woman once married, where she assumes to dispose of property by will, which once belonged to her husband, and where the contestants raise no such question in the probate court. Fatheree *v.* Lawrence, 33 Miss. 585.

[28] Bradish *v.* Gibbs, 3 Johns. Ch. 523, 536.

[29] Grimke *v.* Grimke, 1 Dessaus. 366; Smelie *v.* Reynolds, 2 id. 66.

[30] Cutter *v.* Butler, 5 Foster, 343.

the fact, it was held that the title to such estate vested in the grantee, and that a court of equity will decree the delivery of the deed to him.[31]

SECTION IV.

PROCEDURE. — PERSONS NON COMPOS MENTIS, OR OF UNSOUND MIND.

1. In contested cases of probate the burden of proof rests on the executor, or party claiming under the will.
2. There is some apparent conflict in the opinions expressed upon this point.
3. But this results from not carefully observing the occasion of such opinions.
4. The burden of proof of insanity is upon the party alleging it.

5 and n. 4. The reason of the rule further discussed and explained.

6. Lord Hardwicke's opinion in Wallis *v.* Hodgeson.
7. The courts of equity send such issues to the common-law courts and direct the mode of trial.
8. This point is learnedly discussed in Tatham *v.* Wright.

* 9. Opinion of Chief Justice *Tindal* upon the question.

10. Important distinction whether the devisee is plaintiff or defendant.
11. The ultimate fact to be sought is the competency of the testator to do the act.

12 and n. 15. The extent, and mode of giving evidence of testator's sanity, in opening.

13. The presumption of sanity must have its proper weight in the case.
14. The rule in Maine, as stated by Ch. J. *Whitman*, the same.

15 and n. 21. The strict meaning of onus probandi as defined by Baron *Parke*.

16. There seems to be no reason why the executor should first give proof of sanity.
17. The rule as stated in Connecticut, seems to require this.
18. In other states, where this is not required, the onus probandi is shifted, during the trial.
19. Some of the states require the appellant to go forward in the case.
20. Where the will of one under guardianship is offered for probate, the burden of proof is shifted, with great propriety.
21. The subject of the general onus probandi discussed by Mr. Justice *Thomas*.
22. Clearly decided, in Crowninshield *v.* Crowninshield, that it rests on the executor.
23. But in a later case, it is held the burden of proving insanity rests upon the party alleging that fact.
24. To justify a different presumption in regard to sanity, in wills from deeds, it should appear that the majority of the two classes of cases differed.
25. In New York, the courts have held the burden of proof, as to wills and other instruments, the same.

n. 32. The rule, as laid down in Swinburne, approved.

26. The question as determined by the surrogate of New York.
27. Will executed during a lucid interval, capacity should be clearly established.
28. The same rule obtains in the State of Alabama.

[31] Woodward *v.* Camp, 22 Conn. 457.

29. And in many of the other states.
30. The mode of submitting questions of the valid execution of wills to juries in Pennsylvania.
31. The courts here hold that prima facie evidence of due execution throws the onus on defendant.
32. The preponderance of evidence discussed by Sir C. Cresswell.

§ 5. 1. THE formal burden of proof, in trials directly upon the probate of the will, whether in the court of probate, or upon appeal, is upon the executor, or those who set up the will, in whatever form the trial is required to be conducted.[1] This is in analogy to proceedings upon other instruments, or contracts, * which are contested, either upon the ground of want of execution, or want of capacity in the person contracting, or of fraud in procuring the contract. In all of which cases the formal burden of proof being upon the party setting up the instrument, he is allowed to go forward in the proof, and in the argument.[2]

*[1] In some of the states, where a will is contested, the case proceeds in the name of the executor, and in others, an administrator pendente lite is appointed by the probate court.

*[2] 1 Greenleaf's Evidence, sec. 77; Buckminster *v.* Perry, 4 Mass. 593; Brooks *v.* Barrett, 7 Pick. 94; Comstock *v.* Hadlyme, 8 Conn. 254; Gerrish *v.* Nason, 22 Maine, 438; Barry *v.* Butlin, 1 Curteis, Eccl. 637; Harris *v.* Ingledew, 3 P. Wms. 91, 93; Wallis *v.* Hodgeson, 2 Atkins, 56; Harrington *v.* Rowan, 3 Wash. C. C. 580; Ware *v.* Ware, 8 Greenleaf, 42; Phelps *v.* Hartwell, 1 Mass. 71.

But the contrary rule of practice has prevailed to some extent, in different states. Thus, in Chandler *v.* Ferris, 1 Harrington (Del.), 454, 460, it is said, those who affirm insanity but do not deny the execution of the will, open and close. The same rule is also declared, in Bell *v.* Buckmaster, 1 Harrington, 460, in note, and in Cubbage *v.* Cubbage, 1 Harrington, 461, in n. And in Southerlin *v.* M'Kinney, Rice (S. C.), 35, it is said, the appellants from the Ordinary, in case of a will, are actors, and open and close. And in Tillman *v.* Hatcher, Rice, 271, it is said, the appellant opens and closes, for upon him is the onus probandi. But these last seem to be exceptional cases. The general rule of practice, in regard to the party going forward in the proof, and the argument, is unquestionably as stated in the text.

In Duffield *v.* Robeson, 2 Harrington, 375, it is said the law always presumes sanity, until settled insanity be proved, and this disability, when once established, is presumed to have continued till the making of the will. See also, Jackson *v.* Van Dusen, 5 Johns, 144; Lessee of Hoge *v.* Fisher, 1 Pet. C. C. 163.

If the general competency of the testator be not questioned, the burden of proving, that at the particular time the will was executed he labored under any delusion, aberration, or weakness of mind, rests upon the contestant, and whether such weakened capacity existed at the time, and whether the will was procured by artifice, influence, or control of others, is the subject of affirmative proof, and

2. But it is undoubtedly true, that some apparent confusion exists in regard to the declarations of different judges, as to * which party assumes the burden of proof, in trials, where the incapacity of the testator is alleged.

3. This has resulted chiefly, we think, from not sufficiently bearing in mind the purpose and occasion of such declarations. In most of the cases where it has been argued, that the burden of proof, where insanity is alleged, is upon those who claim to establish the will, it has been upon the ground already stated. And generally, it is presumed, there was no purpose of declaring a different rule, in regard to the presumption of sanity in case of a will, from that which is universally recognized in regard to deeds and simple contracts; although it must be admitted there is much in the books, coming from judges of eminence and learning, which might fairly be made to bear this construction, and which might possibly have been so intended by its authors, in some instances.

4. But these dicta being made, for a different purpose, diverso intuitu, it should not be so applied, when it is found, that there is no just ground for any such distinction. And it must be admitted, we think, upon careful examination of all the cases, that the burden of the proof of insanity, in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact, when established.[3]

5. This is one of the early cases, which has been relied upon to show, that where proof of insanity is offered to impeach the validity of a will, the burden of proof falls upon the executor, or the party setting up the will. But all which is said here, upon the question of the burden of proof, is, that "the proof of a will is attended with more solemnity than that of a deed; the former being supposed to be made when the testator is in extremis; and therefore, in equity, it is necessary to prove the sanity, which is always presumed in case of the latter."[4]

not of surmise and suspicion. Allen *v.* The Public Administrator, 1 Bradf. Sur. Rep. 378. If the testator was of unsound mind just before making the will, it throws the burden of proof upon those who claim under the will to show sanity restored. Halley *v.* Webster, 8 Shepley, 461.

[3] Harris *v.* Ingledew, 3 Peere Wms. 91.

[4] This we believe has reference to the practice in courts of chancery, of proving the mere fact of the execution of a writing, by witnesses examined, vive voce, at the hearing. But this rule did not seem applicable to the case of wills, since the witnesses to such an instrument are placed about the testator for the express pur-

* 6. There is another case, decided by Lord *Hardwicke*, which has been claimed to determine this question in the same direction.[5] The Lord Chancellor here said: "It has been determined, over and over in this court, that you must show the person to be of sound disposing mind, where a will is to be established as to real estate, and especially if there are infants in the case." This was probably said in regard to the mode of examining the witnesses in equity, the same as in the last case referred to, * although it does not precisely appear in the report, how the question did arise.

7. The ecclesiastical courts, as is well known, do not have any jurisdiction of the probate of wills affecting real estate. Hence, they have to be proved in the English courts of common law or equity, whenever questions of title under wills arise in those courts. And the courts of equity, whenever any question arises in regard to the validity of a will, almost uniformly send the question to be tried in the common-law courts, either under the feigned issue, de-

pose of observing his apparent capacity, at the time of executing the instrument, and consequently, when any question affecting the mental capacity of the testator arises in the case, it is proper these witnesses be first examined to that point. But this, in practice, is, we believe, always done mainly by the objectors to the probate. We do not apprehend the executor is bound to examine the witnesses upon the point of the capacity of the testator to execute the instrument offered. He must, undoubtedly, produce the witnesses, in contested cases of probate, and subject them to the cross-examination of the contestants, and thus makes them his witnesses. But there seems no more necessity, or propriety, that the executor should examine the witnesses to the will, in the first instance, upon the mental capacity of the testator, than upon any other question of capacity, such as alienage, infancy, or coverture. All these questions are doubtless involved in the general inquiry, whether the instrument offered be the will of the testator named therein, and upon that broad issue, those who propound the will, take the burden. But this does not reverse the order of proof, in regard to each particular fact, which may be incidentally involved in the entire range of that issue. This is the same inquiry always involved in every trial of an action upon the general issue. The party assuming the general burden of proof upon the issue is not compelled to disprove each particular fact, alleged by the opposite party, in attempting to defeat the proof, upon the main issue. If it should be alleged, in an action upon contract not in writing, that the contract was obtained by fraud, the burden of proof in regard to that particular point would be upon the party alleging it, notwithstanding the general burden rested upon the other party. So also, of the several facts constituting incompetency in the testator, the facts must be established by the party relying upon them, and the party assuming the proof of the main issue may wait until some proof of the existence of such facts, as the contestants rely upon, is adduced. See post, pl. 15, n. 21.

[5] Wallis *v.* Hodgeson, 2 Atkins, 56.

visavit vel non, or in an action of ejectment, to be brought by the party claiming under the will. And in sending such an issue to be tried in the common-law courts, it is not uncommon for the courts of equity to give some directions, in regard to the order and extent of proof to be adduced by the respective parties to the issue involved, as that the plaintiff may read the defendant's answer at the trial before the jury, and that certain facts, which the parties are under rule of the court not to contest, shall be conceded; and in regard to the proof of wills, that the party relying upon the will shall produce all the subscribing witnesses, at the trial, if that is not shown to be impracticable, or unless the opposite party shall waive the production of one or more of them.[6]

8. This subject was very extensively examined and discussed in a later case,[7] before Chief Justice *Tindal*, and Lord Chief Baron *Lyndhurst*, sitting for the Chancellor, Lord *Brougham*, who had been of counsel in the case. And it was there held, that where, as in that case, the bill sought to set aside the will, and the witnesses were some of them understood to be unfavorable to its validity, that it was sufficient for the devisee to call such of the witnesses, as he might elect to do, producing the others in court to be examined by the heir. The general rule * which now obtains in the English courts, is, that the party propounding the will must produce all the witnesses to the will, and make them his witnesses, and give the contestants the benefit of cross-examination.[8] And in the case of Tatham *v.* Wright,[7] it is assumed, as the general rule of practice in the courts of equity, where the will is sought to be established by the plaintiff in the bill, that he must call and examine all the witnesses to the will. The opinion of Chief Justice *Tindal* will be the most satisfactory exposition of the English law which we could give. "If there is any general rule in this court," said the learned judge, "that, in all cases, and under all circumstances, the plaintiff, in an issue on the question, devisavit vel non, has the duty cast upon him of making the three attesting witnesses to the will, his own witnesses upon the trial of the issue, if alive, or in a condition to give evidence, there would be no necessity for discussing the second ground of the motion; for, in the present case, two of the

* 2 Story, Eq. Jur. § 1447; Bootle *v.* Blundell, 19 Ves. 494, 500 et seq.; Ogle *v.* Cook, 1 Ves. sen. 177.

[7] Tatham *v.* Wright, 2 Russ. & My. 1.

* [8] 1 Wms. Ex'rs, 308.

subscribing witnesses, who were alive and actually present in court, under the subpœna of the plaintiffs in the issue, were not called as witnesses at the trial.

9. "It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court, upon the question, devisavit vel non, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted, if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the * interference of this court, and he ought not to obtain it until he has given every opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the practice is put in the cases.[9] But it appears clearly from the whole of the reasoning of the Lord Chancellor, in the case of Bootle *v.* Blundell,[10] that this rule as a general rule, applies only to the case of a bill filed to establish the will (an establishing bill, as Lord *Eldon* calls it, in one part of his judgment), and an issue directed by the court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For, in Lowe *v.* Joliffe,[11] where the bill was filed by the devisees under the will, and an issue, devisavit vel non, was tried at bar, it appears from the report of the case, that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the reporter says, 'to encounter this evidence, the plaintiff's counsel examined several of the nobility and gentry, physicians and attorneys, and some of the friends of the testator, who all strongly deposed to his entire sanity;' and, again, the chief justice expressed his opin-

[9] Ogle *v.* Cook, 1 Ves. sen. 177, and in Townsend *v.* Ives, 1 Wils. 216, the rule is put upon the ground, that the bill is brought against the heir at law, who is an infant, and that the court must protect his rights.

[10] 19 Vesey, 494, 500, et seq.; Cooper, 136. [11] 1 W. Black, 365.

ion to be, that all the defendant's witnesses were grossly and wilfully perjured. And after the trial of this issue the will was established. In such a case, to have compelled the devisee to call these witnesses would have been to smother the investigation of the truth.

10. "Now, in the present case, the application to this court is not by the devisee seeking to establish the will, but by the heir at law calling upon this court to declare the will void, and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this court to direct * that no mortgage or outstanding terms shall be set up against him to prevent his title being tried at law, but seeks to have a decree in his favor, in substance and effect to set aside the will. This case, therefore, stands upon a ground directly opposed to that upon which the cases above referred to rest. So far from the heir at law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee; and such is the form of his application, that if he fails upon this issue, he would not be bound himself. For the only result of a verdict in favor of the will would be, that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule has been held to apply to such a proceeding; and certainly, neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court in directing an issue, is to inform its own conscience, by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule, that such witnesses must be called by one, and such by the other party; but by subjecting the witnesses to the examination in chief of that party, whose interest it is to call him from the known or expected bearing of his testimony, and to compel him to undergo the cross examination of the adverse party, against whom his evidence is expected to make.

"In the present case Mr. Proctor and Mr. Edmund Tatham, two of the subscribing witnesses to the will, had been examined in this court, and their depositions were known to both parties. It was well known, that, if called by the devisee, they would state in effect 'that the testator was, at the time of signing and publishing the will, of weak mind and deficient understanding, though of good

memory; that he was of sufficient mind to make a plain and simple disposition of his property, but not an intricate will like the present.'

* "The real question is, whether these witnesses are to be believed upon this evidence, in contradiction to their own solemn act in the attestation of the will and codicil. That is the problem to be solved. At the time they are put into the witness-box it is known their evidence is in favor of the heir at law, and entirely subversive of the will. What questions, then, can the devisee wish to put to them, other than such as call upon them to explain and account for their solemn attestation of these instruments? And those are questions which can arise upon cross-examination alone. He would wish to ask Mr. Proctor, what could induce him to attest the execution of the will in 1822, and the codicil in 1825, if such was his opinion of the intellect of the testator? Upon what ground he had been the attesting witness to two former wills which had been successively destroyed, and the depositary of the duplicates of each in succession, at the request of the testator, down to the hour of his death? Whether he had not lived in habits of intimacy with Mr. Marsden, and treated him always as a man of understanding and sense? Whether he had not, upon a former occasion, lent money to Mr. Marsden on his bond, and received payment from him, thereby treating him as a man capable of binding himself, and of managing his own affairs? And similar questions would be proposed to Mr. Tatham. It is obvious, that if the devisee should be compelled, on the trial of this issue, to make those witnesses his own, the effect would be to shut out instead of discovering the truth; for after the formal examination in chief, to which alone they could be subjected, the heir at law would take care not to ask them a single question. It is further to be observed, that in the present case, there is the less necessity for calling all the subscribing witnesses to the will, as no question arises upon the facts attending the execution of the will, or the compliance with the requisites of the statute of frauds. There is nothing peculiarly within the knowledge of these witnesses, nor any point to which they could be examined, which is not common to the other witnesses called to depose to the * state of the testator's understanding. Upon the ground, therefore, that there is no rule in this court which calls upon the devisee to bring forward all the subscribing witnesses to the will, where the heir at law files the bill,

— as also, upon the ground that, where the subscribing witnesses contradict the effect of their own attestation, it would not be unreasonable to dispense with the rule, even in cases where it is held to apply, — it appears to us that no new trial should be granted on account of Mr. Proctor and Mr. Edmund Tatham not having been examined by the devisees on the trial of this issue."

11. The ultimate fact to be arrived at, in establishing a will, is the competency of the testator to do the act, at the time it was attempted to be transacted.[12] Hence, where the use of opium or alcohol is alleged, it must be proved that the testator was under its influence at the very time of making the will.[13] And where the will is written entirely by the testator, or what is called an olograph will, it is regarded as affording some presumption of sanity, which will depend indeed very much upon the character of the instrument.[14]

12. And if in form the witnesses to a will are asked the question whether they regarded the testator of a sound and disposing mind and memory, the affirmative answer to this general question is all that is expected in the first instance, and where the validity of the will is contested upon the ground of want of mental capacity, the presumption is against the party alleging this fact, and he goes forward with the proof, as we have seen, in most courts, but the general burden of the issue is not changed. * It is well observed by Prof. Greenleaf,[15] that the exception, in regard to the burden of proof of insanity, in cases of the probate of wills, is rather appaent than real.

*[12] Whitenack *v.* Stryker, 1 Green, Ch. 11; Grabill *v.* Barr, 5 Penn. St. 441; Brooks *v.* Barrett, 7 Pick. 94. The question of capacity refers only to the time of making the will. The burden of proof rests on those who allege unsoundness of mind, but when insanity is once established the burden shifts. Stevens *v.* Vancleve, 4 Wash. C. C. 262.

[13] Temple *v.* Temple, 1 Hen. & Munf. 476.

[14] Temple *v.* Temple, supra.

*[15] 6 Greenleaf's Cruise, 14, n. We venture to suggest that if any inquiry should be made of the witnesses to a will, in the first instance, affecting the mental capacity of the testator, it should be made strictly in the negative form, that is, with a view to rebut any presumption against the party propounding the will, on account of the burden of proof resting upon him. With this view, the witnesses might properly be asked, whether they noticed any thing in the conduct or appearance of the testator, at the time, calculated to show how far he comprehended the nature and scope of the business in which he was engaged, and so far as they did to state it.

13. In the case of Brooks *v.* Barrett,[16] it is decided, that upon appeals, in probate cases, the executor has the burden of proof, and the right to open and close the case, as he is first to prove the execution of the will, and to examine the subscribing witnesses, as to the sanity of the testator. The will being proved by the statutory evidence, the burden of proof is upon the party objecting to its allowance on the ground of insanity, to show that the testator was not of sound mind; and if the evidence is doubtful, the presumption of law in favor of sanity is to have its effect. Such seems to be the rule in other states.[17]

14. In Gerrish *v.* Nason,[18] *Whitman*, Ch. J., said: "The power to make wills and the manner of executing them, and their efficacy, depend upon certain special provisions of statute law, one of which is that every person of sound mind, and of the age of twenty-one years, may dispose of his estate by will." "The presumption, that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments; but the sanity must be proved."[19]

*15. And in Barry *v.* Butlin,[20] Mr. Baron *Parke* said, in pronouncing judgment on the appeal, "The strict meaning of the term

[16] 7 Pick. 94.

[17] Jackson *v.* King, 4 Cowen, 207. See also, Blaney *v.* Sargeant, 1 Mass. 336; Buckminster *v.* Perry, 4 Mass. 593; Hubbard *v.* Hubbard, 6 Mass. 397.

[18] 22 Maine, 438, 440, 441.

[19] This seems to imply that the fact of sanity is involved in the proof of a will, the same as signing. The decision is susceptible of the construction that sanity is to be established, like any other negative fact, by that kind of negative proof which the nature of the case implies. As in the trial of indictments for the carrying on of certain trades without license, the prosecutor is required to take the general burden of proof, and to make a prima facie case of guilt, and upon the whole case to establish the guilt of the accused by the requisite measure of proof, or else fail in the prosecution. But this by no means implies, that if the defendant relies upon a license, or other special exemption from the penalty imposed, he is not to assume the burden of proving such affirmative facts as he alleges in his defence. There is, however, a latter case in this state. Cilley *v.* Cilley, 34 Me. R. 162, where it was decided that there is no legal presumption of sanity, on the question of whether a will shall be established. *Rice*, J., said, "In this state, the rule is, that the presumption that a person making a will was at the time sane, is not the same as in the case of making other instruments. But the sanity must be proved." This seems to be the view contended for by *Thomas*, J., post pl. 23; but the case will find very little support out of this state.

[20] 1 Curteis, 637, 640. See also, S. C. 2 Moore P. C. C. 480; Baker *v.* Butt, id. 317; Browning *v.* Budd, Cid. 430; Parks *v.* Ollatt, 2 Phillims. 323.

'onus probandi' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution." "Sanity is the great fact which the witness to a will has to speak to, when he comes to prove the attestation; and this is the true reason why a will can never be proved as an exhibit, viva voce, in chancery, though a deed may be; for there must be liberty to cross-examine as to sanity." [21]

* 16. This doubt as to the necessity of putting the inquiry to the witnesses, in the first intance, in regard to the sanity of the testator, seems to have embarrassed the minds of learned judges, in stating the law upon this point. In New Hampshire, Chief Justice *Parker* [22] said: "It is probably usual in the probate courts, upon proof of a will, to inquire of the subscribing witnesses, whether the testator was of a sound and disposing mind; but it seems to be well settled, that every man is presumed to be sane until there is some

[21] This seems to us placing the question upon the true ground, that the fact of capacity is so far involved in the proof of the execution of a will, that it is competent for the party objecting to the validity of the instrument to cross-examine the witnesses of the other party upon that point; and he is not obliged to wait till he puts in his own case and then recall the witnesses to the will, thus making them his own as to the point of the capacity of the testator, which he must do if that question is not involved in the proof of the will. But it does not seem equally clear that the party setting up the will is, upon principle, any more bound to examine the witnesses to this point, in the first instance, than he is to any other statutory requirement, such as age, discoverture, citizenship, &c. But we admit the general course of practice in testamentary causes is to examine the witnesses to this point in the opening inquiry. But we apprehend this practice has grown up, in jury trials, in order to vindicate the right to open and close the case. For if there is a presumption in favor of sanity, which is finally to preponderate in the case, and which is of sufficient force to determine it, in the absence of any more decisive, positive evidence, as was very justly held in Brooks *v.* Barrett, 7 Pick. 94, we cannot comprehend why this presumption should not be allowed to have its legitimate operation, in the first instance, as well as in the final result, and be held sufficient to determine that point in favor of those propounding the will, without putting in any positive proof upon that point. This view of the question reconciles all the cases which have attempted to assume the ground that the general burden of the issue, devisavit vel non, is upon the party claiming under the will, but upon any allegation of want of capacity in the testator, it is upon the contestants. This view seems to be maintained in some cases where the subject was carefully examined. Sloan *v.* Maxwell, 2 Green, Ch. 580; Chandler *v.* Ferris, 1 Harrington, 454, 461; Bell *v.* Buckmaster, and Cubbage *v.* Cubbage, ib. in notes.

[22] Pettes *v.* Bingham, 10 N. H. 515.

evidence shown to rebut that presumption." The learned judge evidently felt the force of the irreconcilable incongruity, between the practice alluded to, and the acknowledged principles stated by him.

17. In Connecticut, the rule is clearly established, that the general burden of proof is upon those who propound the will.[23] The learned judge here says, the case is to be tried the same upon appeal as in the probate court: "Those who claim under the will, must, therefore, take upon themselves the burden of proof; and they must not only prove, that the will was formally executed, but that the testator was of sound and disposing mind." And it is here determined that the party propounding the will goes forward in the proof and opens and closes the argument.

* 18. But in some of the states, where the courts appear to have taken the correct view of the mode of proving the will, very much as the matter is stated by Chief Justice *Tindal*,[24] that the party propounding the will is not obliged to examine the witnesses, in the first instance, beyond the fact of execution, and may then wait till some impeachment of the instrument is attempted by counter proof, they seem to have fallen into the delusion that this will change the entire burden of proof, and allow the party alleging want of capacity to go forward and open and close the case.[25]

19. And some of the states have gone so far as to say that a new mode of trial supervenes, upon the appeal, from that which is required in the first instance, and that the appellant will, in every instance, go forward and impeach the judgment below, as in the trials of writs of error. The appellant becomes the actor, and assumes the burden of maintaining the issues framed upon his allegations of the invalidity of the will, whether upon the ground of mental incapacity or any other, and will consequently be entitled to open and close the case.[26]

20. It seems to be regarded as settled law, that one under guardianship, or as the English writers express it, interdicted, is prima facie incompetent to execute a will. But this presumption may be overcome by proof,[27] and the burden of proof on this point rests upon the party offering the will for probate, and of this rule no one can

[23] *Williams*, J., in Comstock *v.* Hadlyme, 8 Conn. 261.

[24] Tatham *v.* Wright, 2 Russ. & My. 1.

[25] Chandler *v.* Ferris, 1 Harrington, 460, 461; other cases reported in note to this case just cited.

[26] Southerlin *v.* McKinney, Rice, 35; Tillman *v.* Hatcher, Rice, 271.

[27] Stone *v.* Damon, 12 Mass. 488; Breed *v.* Pratt, 18 Pick. 115.

justly complain. And where the chancellor is satisfied that a lunatic, under guardianship, has so far recovered as to be competent to execute his will, he may permit him to do so, under the superintendence of a proper officer of the court, without, in other respects, relieving him from the * control of his committee, or the disability consequent upon the proceeding.[28]

21. The question in regard to the general burden of proof, and of the legal presumption in regard to the sanity of the testator, where incompetency to execute the will is alleged, on the ground of mental unsoundness at the time of its execution, is largely discussed by a judge of great learning and experience, and who has given this department of the law special attention, in two recent cases, in the State of Massachusetts.[29]

22. In the former of these cases, it was decided by the court, that the burden of proving the sanity of the testator, under the Massachusetts statute, is upon him who offers the will for probate; and does not shift upon evidence of his sanity being given by the subscribing witnesses. The authorites in the State of Massachusetts and some others, are here very carefully examined.[30]

[28] The matter of Burr, 2 Barb. Ch. 208.

[29] Crowninshield *v.* Crowninshield, 2 Gray, 524; Baxter *v.* Abbott, 7 Gray, 71; in both of which cases the opinions were delivered by Mr. Justice *Thomas*.

[30] In the hearing of the case of Barry *v.* Butlin, 1 Curteis, 638, on appeal before the Judicial Committee of the Privy Council, Mr. Baron *Parke*, in pronouncing the judgment, said: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two, the first, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

Mr. Justice *Thomas* places some stress upon the requirements of the Massachusetts statute in providing that "every person of full age and sound mind" may make a will, as if the requisites of "full age and sound mind" were of the nature of conditions precedent in the testator, to enable him to execute a will. But it is questionable whether this form of enactment was intended, or is fairly entitled to have any such effect. This enactment, which is found in more than one of the American states, although not found in the English statute of Wills of 34 Hen. 8, ch. 5, which does not contain any thing similar, would have been more to the point, if it had provided that every person of full age, and *who is not otherwise disqualified*, may make his will. But instead of this, which was really intended, the statute puts the most common disqualification, "being of unsound mind," for the whole, and adopts the affirmative instead of the negative form of expression. This was all that was intended, doubtless, and the legal effect ought not to be carried beyond this. And it will be noticed, that if this argument proves anything, it proves too much.

* 23. In the case of Baxter *v.* Abbott, the subject was further examined by the court, and the conclusion reached, that upon the trial of an issue of the sanity of the testator, upon an appeal from the decree of the probate court allowing a will, in the absence of evidence to the contrary, the legal presumption is in favor of such sanity. From this proposition the learned judge, who delivered the opinion of the court, dissented. We believe the view taken by the majority of the court is that which has commonly prevailed in the American courts. But, as before intimated, the presumption of sanity seems not altogether consistent with the requirement that the executor shall, in his opening, put into the cases positive proof of the sanity of the testator. If the law presumes sanity, it surely requires no proof of it until there is some adduced in the opposite direction. And Mr. Justice *Thomas* is unquestionably right in saying, that the court, to be consistent, should recede from one or the other of these propositions. We have already sufficiently argued, that consistency is best attained here, by dispensing with all proof of sanity in the opening, as we do upon all other points where the law presumes competency.

24. The supposition, that in consequence of the more frequent occurrence of unsound mind in those who attempt to make wills, than in the makers of other instruments, such as bonds, deeds, and simple contracts, it should justify the reversing of the presumption of sanity in the two cases, goes altogether, as it seems to us, upon a misapprehension as to the proper foundation of such presumption. This presumption is one of fact, founded upon the ordinary course of human experience, and to justify reversing the ordinary presumption, when called to apply it to wills, it is not only requisite that it should be more probable there, than in other cases of the execution of contracts, or instruments, but that it should come to be the more common fact, in the execution of wills, that the testator should * be found, upon scrutiny, mentally incompetent, but this will not be claimed by any one.

25. This question has been discussed to some extent in the

For the statute, as much requires the testator to be twenty-one years of age, as it does that he be of sound mind; and no one can claim that it was ever required of those who offer the will for probate, to put in positive proof of the age of the testator, until that question is raised by the contestants. Reason would seem to indicate, sufficiently, that a similar course should be pursued in regard to other objections to the competency of the testator.

State of New York. But it does not appear that any distinction has been made there between wills and other instruments, in regard to the burden of proof, where it is alleged that the testator was of unsound mind. The question arose in an early case,[31] and the proposition in regard to the burden of proof, is thus stated by *Van Ness*, J., in general terms, as applicable to every species of contract, or instrument: "In all cases where the act of the party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed."[32] *This rule seems always to have been acted upon in this state, with the universally received qualification, that after it is clearly established that the testator had been laboring under settled mental incapacity for a considerable time not long preceding the time of executing the instrument in question, the weight of proof is thrown upon the

*[31] Jackson *v.* Van Dusen, 5 Johns. 144, 158.

[32] The learned judge here refers to the ordinary authorities upon the general question of proving mental unsoundness. Swinb. 45, pt. 2, § 3, pl. 4. "Every person is presumed to be of perfect mind and memory, unless the contrary be proved." "If it be asked wherefore, then, is that usual clause (*of perfect mind and memory*) so duly observed in every testament, *if he that doth prefer the will be not charged with the proof thereof?* It may be answered, that that which is notorious is to be alleged, not proved. And so this being accounted notorious (because where the contrary appeareth not the law presumeth it), it need not be proved." This seems to us placing the question precisely upon the basis of principle. And we cannot but feel, that all the apparent confusion in the matter has arisen from the modern gloss which has been incorporated with the old rule, that the party propounding the will must adduce some proof of the testator's sanity at the time of executing the will, which, with all due submission, we venture to affirm, is either a fallacy, or else it is the expression of a principle too refined for our comprehension. But no man's comprehension can be so far blunted, that he will not be able to perceive the incongruity of requiring a party to give positive proof of the existence of a fact, which the law presumes, in the absence of all proof. We cannot forbear to say, that it seems to us, that many of the recent commentators, upon this question, might be able to comprehend its real point more justly, by returning to the ancient ways, propounded by Swinburne and writers of that date. At whatever date this modern rule of requiring the executor to inquire of the witnesses to the will, in regard to the sanity of the testator, may have originated, it is certain, that it is a departure from the ancient foundations, and equally from principle, and a return to that simple mode of stating the rule, would relieve the matter of much of its apparent embarrassment and confusion. The learned judge here cites, in addition to Swinburne, many of the early elementary writers upon wills, and Tucker *v.* Phipps, 3 Atk. 361; Attorney General *v.* Parnther, 3 Brown, C. C. 443; White *v.* Wilson, 13 Vesey, 87, in all which the general rule is asserted,

party setting up the will, to show that such mental incapacity had ceased at the time the will was executed.[33]

26. The question has arisen in the Surrogate's Court in the city of New York, several times, and seems to have been disposed of by the learned judge in a similar manner. The rule in Allen *v.* The Public Administrator has been already stated,[34] from which it seems the rule is clearly established in that court, that the burden of proving insanity, at the particular time of the testamentary act, rests upon the contestants, and that this is the subject of affirmative proof, and not of surmise and suspicion.

27. This subject was again considered by the learned Surrogate, in Gombault *v.* The Public Administrator,[35] where it was decided, that a will executed near the period of the unquestioned mental incapacity of the testator, should be carefully scrutinized, and diligently compared with the known purposes of the * testator, at a time when he was in the full possession of his faculties. A will made in a lucid interval may be valid; but the same rule, in regard to proof of mental capacity, is observed here, as in cases where the testator was under guardianship at the time of making his will; the burden of proof rests upon the party claiming the existence of such lucid interval, and the execution of the will during its continuance. This is the universal rule upon the subject.[36] We shall recur to this point again, under another head.

28. In Alabama[37] it is held, that when a will is contested on the ground of mental incapacity, the burden of proof, in the first instance, rests upon the party alleging such incapacity, because the court presumes sanity until the contrary is shown. But where lunacy is once established, and it is alleged that the testator executed a valid will during a lucid interval, the party alleging such fact must show sanity and competency, at the particular time when the will was made.

without qualification, that the party alleging insanity assumes the burden of proof.

[33] Lessee of Hoge *v.* Fisher, 1 Pet. C. C. 163; Clark *v.* Fisher, 1 Paige, 171; Bogardus *v.* Clark, 1 Edw. 266; s. c. 4 Paige, 623; Clark *v.* Sawyer, 3 Sandf. Ch. 351; s. c. 2 Barb. Ch. 411; s. c. 2 Comst. 498. Many of these cases, finally, turned upon technical grounds. See also, Snow *v.* Benson, 28 Ill. R. 306.

[34] 1 Bradf. Sur. Rep. 378; ante, n. 2.

[35] 4 Bradf. Sur. Rep. 226.

[36] Gombault *v.* The Pub. Adm'r., 4 Bradf. 226. See also, White *v.* Driver, 1 Phillim. 84; Chambers *v.* The Queen's Proctor, 2 Curteis, 415.

[37] Saxon *v.* Whitaker, 30 Alabama, 237.

29. The same rule, first named, is established in New Jersey.[38] And the same rule obtains in Maine.[39] So also in Georgia.[40]

[38] Trumbull *v.* Gibbons, 2 Zab. 117.

[39] Halley *v.* Webster, 8 Shep. 461.

[40] Griffin *v.* Griffin, R. M. Charleton, 217. The case of Harrison *v.* Rowan, 3 Wash. C. C. 580, is sometimes relied upon, as tending to establish the proposition, that where insanity or fraud is alleged, the party maintaining the will must meet even "the suspicion of proof." But such a proposition is here only thrown out by the judge as matter of abundant caution, and not as a legal necessity. This question was very thoroughly considered in the Parish Will case, Delafield *v.* Parish, 25 New York Court of Appeals, 9, upon the point of the general burden of proof in cases of wills, and the following propositions declared, after a careful review of the authorities.

"It seems to us that these cases fully establish the following propositions:

"1. That in all cases the party propounding the will is bound to prove, to the satisfaction of the court, that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory.

"2. That this burden is not shifted during the progress of the trial, and is not removed by proof of the factum of the will, and the testamentary competency, by the attesting witnesses, but remains with the party setting up the will.

"3. That if, upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied, that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate.

"4. That when it is sought to establish a posterior will, to overthrow a prior one, made by the testator in health, and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made in enfeebled health, and in hostility to the provisions of the first one; in such case the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. And the prior will is to prevail also, unless the subsequent one is so proven to speak the testator's intentions, as to leave *no doubt* that it does speak them." The reporter in the head note adds: At common law and under our statute, the legal presumption is, that every man is compos mentis; and the burden of proof that he is not rests on the party who alleges that an unnatural state of mind existed in the testator. He who sets up the fact that the testator was non compos mentis must prove it. And in the late case of Werstler *v.* Custer, 46 Penn. St. 502, the court sustain the precise rule which we have maintained thus: In an issue devisavit vel non, the party alleging the validity of the will is not bound to prove that the testator was of sound mind when he executed it; but, upon proof of its due execution by the subscribing witnesses, the law presumes sanity, and the party impeaching the will must go into evidence to repel that presumption, before evidence in support of it is necessary. And in the late case of Runyan *v.* Price, 15 Ohio, N. S. 1, it seems to be considered that the plaintiff, in an issue upon the execution of a will need not put in evidence to the competency of the testator in his opening; but he may give such evidence in reply merely.

* 30. This general subject was carefully examined, in a late case in Pennsylvania,[41] and the following propositions declared. The proof of a will consists in evidence of its authentication in due form of law, and that it was the voluntary act of a sound mind; the former question should be determined by the court, as one of law, and the latter by the jury, as one of fact. The issue being on the validity of a codicil, the paper itself * would have been properly laid before the jury, without any proof of its execution, not as evidence, but to enable the jury to see what they were to try. Admitting it in evidence is deciding that there was sufficient prima facie evidence of its execution, to warrant its submission to the jury, to find whether the fact was established, that the testator affixed his signature.

31. It was further held, in this case, that where of three subscribing witnesses, one of the number deposed unqualifiedly to the signature of the testator and his mental capacity at the time, and the second testified that he wrote his name unassisted, except as to the last two letters, his hand being then assisted, but denied the mental capacity of the testator at the time, the fact of execution was sufficiently proved, by two witnesses, and that it was therefore proper to submit the codicil to the jury, and that there was no duty incumbent upon the plaintiff, to call the third subscribing witness. That the due execution of the codicil being proved, the burden of disproving it, and showing that a paper, the contents of which were unknown to the testator, was imposed on him, rests with the defendant.

32. The question of the preponderance of evidence is considerably discussed in a late English case[42] by Sir *C. Cresswell.* The testator for a fortnight was in a state of undoubted insanity. After-

[41] Rees, Adm'r, *v.* Stillé, 38 Penn. St. 138. The matter of submitting the paper to the jury is never one of any practical importance, where cases are proposed to be fairly and fully submitted to the jury, upon the facts arising in the case. There is no more impropriety in allowing the jury to see and read the paper, before any evidence is given, than afterwards. The paper always goes to the jury, and they must consider the evidence with reference to the paper, and it is highly proper they should see it, in the first instance. If the court finally decide that there is no evidence to go to the jury, it ends the case, whether the jury have in fact read the paper propounded for the will, or not. When that point is decided affirmatively, if the defence is unsoundness of mind in the testator, the defendant assumes the burden of proof.

[42] Symes *v.* Green, 5 Jur. N. S. 742 (1859); S. C. 1 Swarbey & Trist. 401, where it is said, that the will being in all respects rational and sensible, in itself, and ex-

wards, for an interval of a month, he was more tranquil, and conversed and acted like a sane man. He then became very depressed as to his religious condition; to such an extent, that those about him were fully convinced that his mind was deranged. Whilst in this condition he made his will. This document was in the handwriting of the testator, was perfectly rational, and in no way connected with, nor did it refer to the subject, upon which he was supposed to manifest insanity. The * attesting witnesses, judging from their knowledge of the deceased's previous condition, and from his manner and demeanor at the time the will was executed, did not think him capable of making one: It was held, that a will made under such circumstances could not be considered the will of a person of sound and disposing mind. It was here declared, that if a testamentary paper is rational upon the face of it, and is shown to have been executed and attested, as prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding; but if there are circumstances which counterbalance that presumption, the court will pronounce against it, unless the evidence is sufficient to establish affirmatively, that the testator was of sound mind when he executed it.

SECTION V.

DEAF AND DUMB PERSONS.

1. Deaf and dumb persons formerly held incapable of making wills.
2. This class of persons are regarded now the same as any others, except as to the burden of proof.
3. It would seem that the witnesses should be able to communicate with the testator.
4. The proper mode of communication.

§ 6. 1. It seems to have been a settled rule of the English law, until a comparatively recent period, that deaf and dumb persons were, prima facie, incapable of making a will, or entering into contracts; and they were even held not responsible for crime. But it

hibiting no trace of the testator's delusion, yet, as the product of an unsound mind, it is not entitled to probate.

* 1 1 Wms. Exrs. 16, 17; Swinb. pt. 2, sec. 10, pl. 2; Taylor, Med. Jur. 690, 691; Co. Litt. 42 b.

was always supposed, that if it were shown that such persons had understanding, or if they were not deaf from nativity, and could write or speak, having once acquired * these faculties, they were to be regarded like other persons, capable of making a will.[2]

2. But since this class of persons have, through the ingenuity of philanthropic men, been educated, and like other persons, been rendered capable of communicating their thoughts and wishes, not only by signs, but by writing also, there seems no more reason for denying them the privilege of making a last will and testament, than in denying it to any other class of persons whatever. And we regard this class of persons, as standing precisely like all others in that respect, with this difference perhaps, that where it appears that the testator was a deaf mute, it will impose upon those who claim to establish the will, the burden of showing, in the first instance, that the testator made the instrument, understandingly.

3. This will be especially requisite in those cases, where the testator was incapable of writing, and was therefore compelled * to communicate with his scrivener, and with the witnesses also, by signs. In such cases, it would seem, upon principle, that to a full compliance with the requisites of the statute, requiring a will to be declared, as such, by the testator, in the presence of his witnesses, they giving their attestation to the act, in his presence and, in some states, in the presence of each other, it would be important that

* 2 Godolphin, pt. 1, ch. 11; 1 Wms. Exrs. 16; 1 Jarman, ed. 1861, 29; Dickenson *v.* Blissett, 1 Dick. 268; In re Harper, 6 M. & G. 731; Potts *v.* House, 6 Geo. 324. See also, Morrison *v.* Lennard, 3 C. & P. 127; State *v.* De Wolf, 8 Conn. 93. As late as the case of Brower *v.* Fisher, 4 Johns. Ch. 441, it was considered that deaf and dumb persons were to be regarded as, prima facie, non compos mentis, until capacity was proved by special inquest. And all persons, who are in fact incapable of managing their affairs, are subject to a commission of lunacy, and prima facie incompetent to contract, or to make a will: In the matter of Barker, 2 Johns. Ch. 232. But we apprehend that at the present day an educated deaf mute is presumptively competent to manage his affairs, and to make a valid will. He may perform the act of execution understandingly by means of a written communication — Moore *v.* Moore, 2 Bradf. Sur. Rep. 265 — or by the sign language, if the witnesses were familiar with that language. In a recent case in the English Court of Probate, Owston in re, 2 Swab. & Twist. 461, where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused the probate.

all the witnesses made necessary, should be able to communicate with the testator, and to comprehend his declarations thus made. But we know no case where the subject has been so viewed.

4. But in the case of educated mutes, who are capable of communicating by writing, there would be no such difficulty. And the fact that the testator wrote the will might fairly be regarded as sufficient evidence, prima facie at least, that he made it understandingly. It might still be necessary, in practice, that he should, before the witnesses, make some recognition of the writing as his last will and testament, and intimate his desire to execute it as such, in their presence, by something more unequivocal than mere signs. It would certainly be prudent, and proper, for the witnesses to be assured of these matters, by some written intimation from the testator.[3]

SECTION VI.

DEAF, DUMB, AND BLIND PERSONS.

1. Persons deprived of the sense of sight have always been held capable of executing a will, with proper precautions.
2. The difficulty very greatly increased when there is a defect of sight and hearing.
3. Such persons may execute wills.
4. Care should be exercised not to lay down rules of exclusion too stringent.
* 5. There can be no question such person may give testimony or execute his will.
6. Rule as declared by the surrogate of New York.
n. 4. The rule of the Civil Law more circumspect.
7. Not required by our law that the proof of the testator's knowledge of the contents of his will come from the witnesses to its execution.
8. The rule laid down by Swinburne required will to be read to testator in the presence of witnesses.
9. This rule is relaxed, and is in conformity to analagous cases.
10. Comments on some of the established rules.
11. But there should be clear proof that no imposition was practised.
12. Blindness alone no proof of mental incapacity, but imposes duty of watchfulness.

§ 7. 1. THERE seems to have been, from the earliest times, special precautions used in the proof of the wills of such persons as

* [3] Wharton & Stillé, Med. Jurisprudence, 16, sec. 13; Reynolds *v.* Reynolds, 1 Spears, 256, 257. In the very recent case of Geale in re. 3 Sw. & Tr. 430, where probate was sought of the will of a person, deaf and dumb, and illiterate, the court required evidence, on affidavit, of the signs by which the testator had signified that he understood and approved the provisions of the will, before making the grant.

were deprived of the sense of sight. They were, by the Civil Law, required to be read over, in the presence of the testator and his witnesses, and approved by him in their presence. And this course is recommended by the English text-writers upon this subject, although not regarded as altogether indispensable by the courts there.[1]

2. But there can be no question, that persons incapable of reading, whether from defect of sight, or want of instruction, or sickness, or other cause, require that instruments to be executed by them in the presence of witnesses, should be read over, in the presence of the witnesses and of the person executing them, in order to afford the fullest assurance of the execution being understandingly done.[2] And these embarrassments, and the consequent necessity for the use of greater precautions, must be very much increased in those cases, where the testator is * deprived both of the sense of hearing and of sight, which sometimes occurs.

3. But there can be no question whatever, at the present day, that such a person, having received instruction so as to be able to comprehend the nature of the transaction, will be entirely competent to execute a will. All that is requisite in such cases is, that the proper communication be made from the testator to the witnesses, so that they may be able to depose, to the act being understandingly done. This is in some sense a matter of special skill, and to its most successful transaction might require the intervention of experts, as the primary witnesses of the act. But something short of this may very probably be held, by the courts, to answer the requirements of the law.

4. It is certainly a very essential duty of those, who have the practical administration of the law in their hands, to be watchful, that in laying down general rules for the guidance of parties concerned, it be done with such wisdom and forecast, that past transactions be not thereby rendered void, or future ones impracticable. The rule to be observed in such cases is very analogous to that in

*1 1 Wms. Exrs. 17, 18; Fincham *v.* Edwards, 3 Curteis, 63. Where a blind person is able to sign his name, and does so in the presence of the witnesses, in the execution of his will, this being a compliance with the express requirements of the statute, such a will of lands is held sufficient in the common-law courts, if it appear that it was understandingly done. Longchamp *v.* Fish, 5 Bos. & P. 416; In re Piercy, 1 Rob. 278.

2 1 Wms. Exrs. 18; 4 Burns, Eccl. Law, 60, 61; Barton *v.* Robbins, 3 Phillim. 445, n. (b); Day *v.* Day, 2 Green, Ch. 549.

regard to giving testimony. In this respect deaf and dumb persons were formerly regarded as idiots.

5. But since the discovery of their susceptibility of extensive culture, nothing more is required, than that the person, offering such a one as a witness, should first establish the fact, that he is capable of comprehending the obligations of an oath.[3] And the same holds true as to executing a will by such person.

* 6. This question was carefully examined by the surrogate of New York,[4] with the following results: The law does not prohibit

[3] 1 Greenleaf, Ev. § 366. The witnesses may give testimony, either by signs or by writing, the latter being regarded as the preferable mode, if the witness is able to write. The old presumption of idiocy in regard to deaf and dumb persons seems to have rested upon two grounds: 1. That they were incapable of cultivation or education; 2. That they had no appreciation of religious obligations or duties. Lord Hale, for authority upon this point, refers to the laws of King Alfred, ch. 14: Si quis mutus vel surdus natus sit, ut peccata sua confiteri nequeat, nec inficiari, emendet pater scelera ipsius. 1 Hale, P. C. 34. It was the rule of the Roman Civil Law, that deaf and dumb persons were non compos mentis, incapable of making wills, or of any civil, responsible act. 1 Beck, Med. Jur. 881, and note. And in Young *v.* Sant, Dyer, 56 a, n. 13, it was held, that one who had become deaf, dumb, and blind, by accident, after birth, was to be held non compos mentis. And Blackstone says that a man born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot. 1 Comm. 304; Co. Litt. 42; Fleta, lib. 6, c. 40. And this has been held a prima facie presumption of the law for many years. Chitt. Med. Jur. 348; Brower *v.* Fisher, 4 Johns. Ch. 441. But the present rule in America seems to be that deaf and dumb persons are not even presumptively defective in understanding. Christmas *v.* Mitchell, 3 Ired. Ch. 535.

[4] Weir *v.* Fitzgerald, 2 Bradf. Sur. Rep. 42. Blackstone, 2 Com. 497, lays down the rule, that "such persons as are born deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having animum testandi, and their testaments are therefore void." And by the Roman Civil Law, the same rule is declared surdus, mutus, testamentum facere non possunt. Dig. Lib. xxviii. tit. 1, §§ 6, 7. But it seems to have been allowed where the defect was not congenital. Cod. Lib. vi. tit. 22, § 10. A blind man was allowed to make a nuncupative will by declaring the same before seven witnesses. Cod. Lib. vi. tit. 22, § 8; Inst. Lib. ii. tit. xii. §§ 3, 4; Dig, Lib. xxxvii. But he could not make a will in writing, unless it was read to him, and acknowledged by him to be his will in the presence of the witnesses, ib. This requirement of the Civil Law, which interposed so reasonable a precaution against fraud in the case of testators, deprived of sight, has not been made one of the indispensable statutory requirements, either of the English or American law, so far as respects that class of persons, if we except the State of Louisiana. 11 Jarman, ed. 1861, 29; Mitchell *v.* Thomas, 6 Moore, P. C. C. 137; Ray *v.* Hill, 3 Strobh., Law 297; Boyd *v.* Cook, 3 Leigh, 32; Lewis *v.* Lewis, 6 Serg. & R. 496; Clifton *v.*

deaf, dumb, or blind persons from making a will. Defects of the senses do not incapacitate, if the testator *possesses sufficient mind to perform a valid testamentary act. The statute does not require a will to be read to the testator, in the presence of the witnesses; but it is proper to do so, when the testator is blind, or cannot read. Besides the mere formal proof of execution, which is required in all cases, something more is necessary to establish the validity of a will, when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required, that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or by other proof.

7. It is not required in the proof of wills, executed by blind persons, that the witnesses should be able to prove that the testator was cognizant of the contents of the paper, which he declares to be his will, and desires the witnesses to attest. This has been so ruled in the cases already cited.[5] And the same rule applies to persons deaf and dumb, as well as blind.

8. The rule laid down by *Swinburne*,[6] in regard to the formalities requisite to the validity of wills made by blind persons, seems altogether reasonable: "He cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will. And therefore if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this were not sufficient; for it may be, that if he should hear the same, he would not own it."

Murray, 7 Georgia, 564; Wampler *v.* Wampler, 9 Md. 540. *Richardson*, J., in Reynolds *v.* Reynolds, 1 Spears, 256, 257, said: "I would not say that it is absolutely impossible (although it is so considered by great writers) that even a blind and a deaf and dumb man can make a will." A person who is deprived only of the sense of sight does not require, to the valid execution of his will, that it be read to him in the presence of the witnesses. Martin *v.* Mitchell, 28 Ga. 382. The declarations of a blind man, made after the execution of his will, are competent to show that he knew the contents of the will when he executed it. Harleston *v.* Corbett, 12 Rich. Law, 604.

[5] Longchamp *v.* Fish, 5 Bos. & Pul. 415; Fincham *v.* Edwards, 3 Curteis, 63; Barton *v.* Robbins, 3 Phillim. 455; Moore *v.* Paine, 2 Cas. temp. Lee, 595.

[6] Pt. 2, § 11, pl. 1, citing a long list of Civil Law and Continental writers to the point.

9. But, as we have before seen, this rule has been very much relaxed, both in England and America, and we see no reason for requiring positive evidence of the will being read, to a *testator who is blind, in the presence of the witnesses; since it has been decided, that where a will is drawn up in the presence of the testator, and signed by him, although not read to or by him, if properly executed and witnessed, it becomes a valid testament, upon proof that it was in fact drawn up according to the testator's instructions.[7]

10. But upon principle we should have regarded both of the foregoing propositions not maintainable, and especially the latter; but they seem maintainable upon unquestionable authority, and practically are more convenient than a more strict construction.

11. But Mr. Jarman's rule in regard to this point is the very least that will insure safety, "that, in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised," but that the testator did, in fact, fully understand every portion of the paper, which he executed as his will.[8]

12. Blindness alone, whether congenital or accidental, has never been regarded as affording any ground for presuming mental incapacity, to transact business, or make a will understandingly, but only as inposing upon those who assume to establish such acts, on the part of persons laboring under such defects, greater watchfulness in the transaction, and a corresponding clearness of proof, that they were done with full knowledge, and without constraint.[9]

*SECTION VII.

PERSONS OF UNSOUND MIND.—DEFINITION OF DIFFERENT CLASSES

1. Lord Coke's definitions and classification.
2. Idiots from birth are incapable of definition. They are mere animals.
3. The most approved writers describe rather than define this class of persons.

*[7] Hess's Appeal, 43 Penn. St. 73; post, § 18, pl. 29.

[8] 1 Jarman, Eng. ed. (1861,) 29.

[9] Wharton & Stillé, Med. Jur. § 141, and authorities cited.

4. Persons become idiots from disease or decay. All idiots are wholly incapable of any civil or criminal act.

n. 4. Description by Dr. Ray and Dr. Howe.

5. All questions on this subject, in courts of justice, concern those not idiots.

6. Lunatics, strictly, are such as have mental unsoundness in intermittent form.

7. An interruption of the disease is partial. Lucid intervals imply a perfect restoration of the mind, for a time.

8. Lunacy in its broad sense includes all mental unsoundness except idiocy.

n. 5. Dr. Lushington's definition of this latter defect. Its distinctive character is fixedness.

9. Monomaniacs are diseased upon one or more subjects. Otherwise sound.

10. Delirium from inflammation or stimulus is temporary madness.

11. Senile dementia is the recurrence, by mere decay, of second childhood.

§ 8. 1. Lord Coke,[1] in his classification of persons of unsound mind, or non compos mentis, as it was then denominated, thus distinguishes them: 1. An idiot or fool natural; 2. He who was of good and perfect memory, and by the visitation of God hath lost the same; 3. Lunaticus, qui gaudet lucidis intervallis, who sometimes is of good and perfect memory, and some other times non compos mentis; 4. He that is so by his own act, as a drunkard. Substantially the same classification upon this subject still continues. For convenience, with reference to testamentary capacity, we have chosen to adopt rather a practical than a technical arrangement.

2. Idiots from birth require no specific definition. The term is so nearly simple and axiomatic, that it is scarcely susceptible * of additional simplification, or definition. The attempt has often been made, but with indifferent success. One of the earliest definitions of idiocy is in Fitzherbert,[2] which consists in the inability to count "twenty pence," or "tell who was his father or mother, or how old he is." But as Lord Hale[2] very justly says: "These though they may be evidences, yet are too narrow and conclude not always." This definition forms the staple of all the subsequent definitions of this class of persons. But Lord Hale's conclusion seems to put this question upon its true basis. "For idiocy, or not, is a question of fact triable by jury, and sometimes by inspection."

* [1] Beverly's case, 4 Co. Rep. 123.

* [2] F. N. B. 532 B. It is here said also, "So as it may appear he that hath no understanding of reason, what shall be for his profit, or what for his loss. But if he hath such understanding, that he know and understand his letters, and do read by teaching or information of another man, then it seemeth he is not a sot, nor a natural idiot." This seems by far the most important portion of the definition, but is not commonly alluded to by later writers upon the subject. 1 H. P. C. 29.

3. The most approved writers upon medical jurisprudence, now regard even congenital idiocy, as altogether incapable of strict definition. It is characterized, in its extreme form, by a total want of capacity for business, or for labor even, unless under the eye of a superior; by an almost total defect of articulate language; and a vague, unmeaning look; they are what they always have been, without improvement, or loss of mental capacity or knowledge.[3]

* Idiots, who were not so from birth, are such as have wholly lost all memory and judgment, from disease, or as occurs, in some extreme cases, from age and decay. In regard to such persons, as are denominated idiots, from whatever cause, there is no capacity to contract, or execute a valid testament, and no responsibility for crime even.

5. The only questions which arise, in courts of justice, in regard to the capacity or responsibility of persons of unsound mind (which is now the general term, used in the law, to denote every degree of mental incapacity), have reference to such as are not absolute

[3] Taylor, Med. Jur. ed. (1861,) 633, 634. Dr. Ray, Med. Jur. of Insanity, § 54 et seq., says: "Idiocy is that condition of the mind, in which the reflective, and all or a part of the affective, powers, are either entirely wanting, or are manifested to the slightest possible extent." "In reasoning power, many idiots are below the brutes. Unable to compare two ideas together, nothing leads them to act but the faint impressions of the moment, and these are often insufficient to induce them to gratify even their instinctive wants." And this definition is adopted by Wharton & Stillé, in their very satisfactory treatise upon Med. Jur. § 222.

The classification by Dr. Howe, in his report to the Massachusetts legislature upon the condition of idiots within the Commonwealth, comes from a source entitled to confidence and respect.

IDIOTS of the lowest class are mere organisms, masses of flesh and bone in human shape, in which the brain and nervous system have no command over the system of voluntary muscles; and which consequently are without power of locomotion, without speech, without any manifestation of intellectual or affective faculties.

FOOLS are a higher class of idiots, in whom the brain and nervous system are so far developed as to give partial command of the voluntary muscles; who have consequently considerable power of locomotion and animal action; partial development of the intellectual and affective faculties, but only the faintest glimmer of reason, and very imperfect speech.

SIMPLETONS are the highest class of idiots, in whom the harmony between the nervous and muscular system is nearly perfect; who, consequently, have normal powers of locomotion and animal action; considerable activity of the perceptive and affective faculties, and reason enough for their simple individual guidance, but not enough for their social relations.

idiots. But the question is often made, of course, how far one is to be regarded as an idiot.[4]

* 6. Lunatics are those, who were formerly supposed to be under

[4] The remarks of *Dr. Lushington* in Bannatyne *v.* Bannatyne, 14 Eng. L. & Eq. 581, 590, 591, are important: "Before entering upon this branch of the case, I must bear in mind what the nature of the case set up in opposition to the will is. I must repeat that it is not lunacy — it is not monomania — it is not any species of mental disorder, the symptoms of which it may, at periods, be difficult to detect; but the case presented is that of idiocy or imbecility, the characteristic of which is permanence, with little or no variation, though often, in the case of idiots, it does sometimes happen that there will be a greater degree of excitement demonstrated than at other periods. How is such a case to be met? I apprehend, to meet it, and to show that such a state of things did not exist, at any given period, proofs of acts of business are most important evidence. Many acts of business could possibly be done by a lunatic, and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person. I shall look, therefore, in the first instance, to the acts of business. It is proved by Mr. Falkner, that the deceased kept an account with Messrs. Tuckwell, at Bath, for four years, from 1818 to 1821, and during all that period occasionally drew drafts, and all those drafts were paid to himself over the counter. The first is dated the 31st January, 1818; the last, May, 1820. According to the evidence, the deceased came himself to the counter, and there is no proof of any one accompanying him on such occasions; he asked for the sum he wanted; the clerk filled it in, he signed it, and took the money. Surely no idiot could have done this, for he must have exercised thought to go to the bank, memory and judgment as to the sum required; and moreover his conduct and demeanor could not at such times have been as described by the witnesses against the will, or, from the glaring colors in which his imbecility is depicted, it must have been discovered, and the business never could have been transacted at all." "I consider these transactions, then, of, first-rate importance towards solving all the difficulties of this case; for here, after the lapse of about thirty years, the court has the advantage of facts proved, with the dates duly affixed to them. I do not say that these facts alone utterly disprove that the testator was" at the asylum, "at the beginning of 1819, but they go a long way towards it; and even if at some time thereabouts the deceased was at the asylum they do prove that the deceased did acts of business requiring what I think cannot be denied, some thought and some understanding. There is, I must say, not the least evidence to show, that in any one of these acts of business the deceased was assisted by any one person whatever — the presumption is the other way; and to put these acts upon the very lowest basis on which they can be placed, they do utterly disprove idiocy or imbecility. I will simply repeat, what I have already indeed said, that those who are afflicted with lunacy sometimes have the management of and can manage their pecuniary affairs — an idiot never. Now, the next branch of evidence is, in my opinion, almost equally instructive; it is the evidence of dealing with tradespeople." "He gave orders himself, he paid his bills himself, he knew the value of money, and was careful to settle the price before the order — very particular, in joint accounts with his brothers, that he should not be charged beyond his fair proportion."

the peculiar influence of the moon, from which the term is *derived. This idea resulted from the recurrence of lucid intervals, which is more or less true in the first stages of all cases of insanity. By this we mean, that attacks of insanity, until they become confirmed and incurable, are, to some extent intermittent, and subject to alternate paroxysms and relaxations, at intervals of irregular duration and frequency, or these intervals may be of periodical occurrence.

7. The term lucid interval has acquired a kind of technical import in legal language, and is not, in that sense, applicable to this intermittent character of the disease. We shall have occasion hereafter to define this with more precision, when it will be more convenient to point out the specific distinction, between a mere intermission of the disease, and a temporary restoration to entire sanity, which is what is understood by a lucid interval.

8. The term lunatic, in its more extended import, includes all persons of unsound mind who are not idiots, or imbeciles.

9. Monomaniacs are those persons, who are insane upon some one or more subjects, and apparently altogether sane upon others. The capacity of such persons to execute a will, where the subject of their infirmity was not involved, has been very generally admitted.

10. Persons may be affected with delirium from inflammation or stimulus; and while this state continues to such a degree as to overwhelm the reason and judgment, it produces a total incapacity to execute a will or do any binding act in the way of contract. In regard to responsibility for crime it is otherwise, when produced by stimulus; as this is considered a voluntary madness, it has not been regarded as any excuse for crime, unless, or until it produce positive insanity, which is sometimes the case.

11. Senile dementia is that peculiar decay of the mental faculties, which occurs in extreme old age, and in many cases much earlier, whereby the person is reduced to second childhood, and becomes sometimes wholly incompetent to enter into any binding contract, or even to execute a will. It is the recurrence of second childhood by mere decay.

* SECTION VIII.

IDIOTS AND IMBECILES.

1. Imbeciles are wholly deficient in observation, comparison, and judgment.
n. 2. The capacity requisite to execute a will defined and illustrated.
2. Imbecility of mind is commonly congenital, or occurs in advanced age, but is sometimes the result of sudden shock, or calamity.
3. It may be produced by accidental causes. Its characteristics.
n. 3. Some illustrations of the subject.

§ 9. 1. FROM what has been before said, it is obvious the only inquiry here is in regard to the mode of determining, who are to be reckoned absolute idiots in the law. As we said,[1] we cannot define an idiot except by comparison. One test of exemption from this class is capacity for improvement, or acquisition. But this is admitted to be fallacious, unless we confine it to mental improvement, or the strengthening of the powers of comparison and judgment. For idiots often have something of memory and imitation, whereby they are able, to a very limited extent, to increase their knowledge of facts. But they are wholly deficient both in the perceptive and reflective faculties. They possess neither observation nor judgment. And the little memory they have is wholly passive. They have no ability to recall, at will, past transactions, and no forecast. And all these powers, in a greater or less degree, enter into the act of an understanding disposition of property, to take effect after one's death.[2] And without the possession of these faculties, it is confessedly impossible for one to execute a valid will.

* [1] Ante, § 8.

[2] Converse *v.* Converse, 21 Vt. 168. The extent of capacity requisite to take one out of the category of imbeciles is here thus defined: "It is not easy to lay down any precise rule as to what exact amount of mental capacity is sufficient to enable one to dispose of property by will. Less mind is ordinarily requisite to make a will, than a contract of sale, understandingly, for the reason that, in contracts of sale, there are usually two parties, and some degree of antagonism between their interests and efforts; so that here mind is opposed to mind, and consequently it is somewhat more difficult to see clearly the just bearing of all the relations presented, than under the common circumstances of making a will, where one is left free to act upon his own perceptions merely. But this is not always the case in making a will. One may be beset by an army of harpies, in

* 2. By far the most numerous portion of this class of persons have been so from birth, or become so in extreme old age. But absolute dementia, where there is an entire destruction of the mental faculties, is by no means an uncommon consequence of insanity, whether in the form of mania or monomania, and not unfrequently results from some severe and sudden moral shock.[3] * As we have before shown,[4] the most common characteristics of this entire class of persons, whether the malady is congenital or accidental, is entire incapacity for business, and absolute permanency in condition.

3. It is probably more common for sorrow and bereavement, and business calamities, to destroy life, than to break down the mind merely. But there are multitudes of cases where persons are ren-

the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale.

"But it may be safe no doubt to affirm, that, in making any contract understandingly, one must have something more than mere *passive* memory remaining. He must undoubtedly retain sufficient *active memory*, to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. The elements of such a judgment should be, the number of his children, their deserts, with reference to conduct and capacity, as well as need, and what he had before done for them, relatively to each other, and the amount and condition of his property, with some other things, perhaps. The capability of men in health to form correct judgment in such matters, is no doubt very unequal, and, when there is no inherent incongruity in the will itself, and no just ground to suspect improper influence, juries are, and perhaps should be, very liberal in sustaining testamentary dispositions. But there must undoubtedly be some limit. When one is confessedly in a condition to be constantly liable to commit the most ludicrous mistakes, in regard to the most simple and familiar subjects, he ought not to, and cannot, make a will."

[3] In a little book, written by an undistinguished and almost unknown country clergyman, by the name of Grant Powers, upon the Effect of the Imagination upon the Nervous System, we have a most wonderful array of facts and argument upon the subject, showing conclusively that the loss of consciousness, and * of reason, and even of life itself, is not an unfrequent consequence of mere surprise or delusion. And the instances are many of them near at hand. A gentleman in Francestown, New Hampshire, fell dead, upon hearing it announced that he was elected town clerk. Another in Warren, New Hampshire, fell dead, upon being told by the sheriff that he had a writ for him. And the instances are almost innumerable, where children, by fright, or grief, or sudden joy, have been rendered permanently idiotic. And there are sufficiently numerous reports of persons in more advanced life having suffered in the same way, to assure us that such occurrences are by no means uncommon.

[4] Ante, § 8, n. 3.

dered permanently insane, and finally imbecile, by disappointment, bereavement, religious despair, and other severe shocks upon the nervous system. One marked peculiarity of this species of mental derangement is, that the person evinces often a sudden revulsion of feeling, going at a single bound from almost hopeless despair to the most ecstatic joy, from imaginary distress to equally unreal happiness. And those who have devoted their lives to the care and the cure of insane persons, assure us, that cases of great exaltation of joy are more likely to end in incurable imbecility, than those of unnatural depression.

*SECTION IX.

INSANITY FROM DISEASE. — LUNACY.

1. This is indicated by sudden and unaccountable change of character.
2. By delusion, and incapacity to estimate the true relations of things.
n. 2. Extended analysis and illustration of the subject.
3. Intellectual perversion and false judgment often occur.
4. Unaccountable moral obliquity not an unusual concomitant.
5. These different characteristics often occur in the same person.

§ 10. 1. THE symptoms of insanity are quite incapable of description or classification.[1] It is sometimes very obvious, and at others exhibits itself in modes and forms so subtle, as to almost elude the observation of the most wary and experienced. One of its most reliable evidences is, where the individual comes suddenly to exhibit a marked change in his habits and tastes, preferring what he before avoided or disliked, and where there is no assignable cause for the change, unless it be one affecting mental capacity.

2. The belief in the existence of mere illusions, or hallucinations, creatures purely of the imagination, such as no sane man would believe in, are unequivocal evidences of insanity. But where the party has correct perceptions, he will generally be found able to make an understanding disposition of property by will, unless from

[1] Taylor, Med. Jur. 629. One may, and often does, suffer very marked changes in character, in the course of years, and this is no ground of imputing aberration of mind. So, too, there are instances of very sudden transformations short of insanity. But such changes are regarded by medical writers as one of the most satisfactory evidences of insanity. Wharton & Stillé. §§ 106, 192, 195, 202.

imbecility he is incapable of estimating the just relations of things, or perhaps of recollecting fully the elements of a will.[2]

* 3. But there are many cases where the intellectual powers seem to have suffered a perversion, so that the person becomes incapable of forming correct inferences and deductions from those facts which he may correctly observe or recollect, and thus his judgments be no safe guide for his conduct. But this form of insanity is of much less frequent occurrence than the next. And it was formerly supposed, and is now to some extent, even among the reasonably well informed, that the proper definition of insanity consisted in this, that the person had false perceptions, but reasoned correctly from his false assumptions. But this is true only in the more common forms of the disease.

* 4. Moral unsoundness, where the passions and emotions, and the entire moral composition are so far perverted, and inverted, so to

[2] Taylor, Med. Jur. 629. This most reliable writer says: "The main character of insanity, in a legal view, is said to be the existence of *delusion:* i. e., that a person should believe something to exist which does not exist, and that he should act upon this belief." Dr. Ray, Med. Jur. of Insanity, § 128, ed. 1860, says: "Madness is not indicated so much by any particular extravagance of thought or feeling, as by a well marked change of character or departure from the ordinary habits of thinking, feeling, and acting, without any adequate external cause." And after stating very forcibly that it is impossible to erect any sure and unerring standard of sanity, by which one suspected of mental unsoundness is to be measured and his condition thus determined, he says: "In a word he is to be compared with himself, not with others." And Dr. Gooch, in the London Quarterly Review, No. 42, 355, says: "It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking, usual to the individual when in health, that is the true feature of disorder in mind." And again the same writer says: "It is therefore not the abstract act or feeling which constitutes a symptom; it is the departure from the natural and healthy character, temper, and habits that gives it this meaning, and in judging of one's sanity it is consequently as essential to know what his habitual manifestations were, as what his present symptoms are." It often occurs that the testimony discloses some cause, either physical or moral, affecting either his prospects in life, or his physical system, and which experience has taught us to expect might have more or less tendency to derange and disorder the mind, and which is contemporaneous with the marked change in temper, disposition, and character, which it is also proved has come upon the testator before the time of executing his will. This would tend very decidedly to confirm the apprehension of the existence of insanity. And if the change shown to have occurred could be shown to have had any connection with those who were his natural heirs, or with the persons to whom he had bequeathed his estate, it would raise a very natural apprehension of mental unsoundness.

speak, as to leave no natural, or normal affections, is common, and in a degree almost universal, in cases of insanity. Says an able writer,[3] "Extreme irritability, proneness to anger, suspicion, concealment, obstinacy and perverseness, are common. In regard to the affections, various abnormal impulses and inclinations are observed. Fondness or aversion to particular persons, without any special reason; disposition to exercise cruelty, murderous desires, a wish to commit arson, or to steal. Memory is generally good in reference to things occurring durring the disease, or as to persons with whom the patient was then connected, but defective or mistaken as to things which occurred previously. Of the intellectual faculties not all are uniformly in an abnormal state; on the contrary, some functions occasionally improve, thus producing a complex state of madness, on the one hand, and of wit, reflection, and shrewdness, on the other. Monomania, is also included under this head. There is often a disposition to soliloquize aloud; and to laugh, without a visible reason."

5. And there are many cases where all these defects and irregularities of the mind and the affections concur in the same person. And either the one or the other will be developed just according to the exciting cause which is presented. But it is not by any means an uncommon occurrence, that paroxysms of one character or another will occur without the suspicion of the existence of any exciting cause, and often where, to all human appearance, it would seem none could have existed.

*SECTION X.

PARTIAL INSANITY.—MONONAMIA.

1. The characteristic of monomania is, that it exhibits itself only to a very limited extent.
2. It differs from eccentricity, chiefly, in the unconsciousness of any peculiarity.
n. 1. Insane delusion is the belief of facts which no sane person could believe.
3. The test of insanity often exists in the surrender of the will to imaginary direction.

*[3] Wharton & Stillé, § 106. We do not, by adverting here to this form of insanity, intend to recognize that absurd development of moral obliquity, which allows the possessor to commit crime without compunction, as insanity. If that were to be allowed, there would always exist a ready excuse for crime. The act itself would always afford satisfactory evidence of the existence of the malady.

4. Moral insanity is not commonly called into exercise in the testamentary act.
5. Partial insanity, or monomania, is the most difficult form in that respect.
6. The case of Greenwood presents a remarkable delusion. It existed only in regard to his next of kin.
7. The case of Dew *v.* Clark is a leading one upon this question.

n. 6. Lord Lyndhurst's commentary upon partial insanity.

8. The opinion of Sir John Nicholl contains an instructive commentary.
   a. Violence, cruelty, or antipathy, is not insanity. There must be mental perversion on the subject of the will.
   b. Where the will is the direct offspring of morbid delusion it cannot be upheld.
   c. Lord Hale's definition of partial insanity. It is exceedingly difficult of clear definition.
   d. The forms and developments of madness almost infinite. Illustrations.
   e. The term madness very loosely applied in popular use; most persons have seen cases.
   f. The difference between insane, and other delusion, is that argument and reason avails nothing in the former, and will commonly remove the latter.
   g. Dr. Battie defines it as "deluded imagination."
   h. Mr. Locke seems to suppose it consists in reasoning correctly from false premises!
   i. But he includes false fancies, and partial derangement in his definition.
   k. Dr. Francis Willis, a great authority, and one of large experience.
   l. He says an unsound mind is marked by delusion, insensibility, or perversion of feeling; and sundry other characteristics.
9. The general result of all the cases is, that a will produced or colored by insane delusion cannot be upheld.
10. Lord Brougham's opinion that partial insanity produces testamentary incapacity.
11. This does not appear to have been followed by the courts, or by writers upon the subject.
12. Dr. Taylor's analysis of the cases.
*13. Moral insanity may invalidate a will, where it has an agency in producing it.
14. Marked case of eccentricity, but held not to amount to insanity.

n. 13. Comments upon the propriety of the decision.

15. Sir H. J. Fust's distinction between insanity and eccentricity.
16. Unnatural fondness for brute animals no certain indication of insanity.
17. The marked distinction between eccentricity and insanity is, that the conduct of the former is characteristic of the person, but that of the latter is not.
18. Delusion in the deed to avoid the instrument must appear to have formed the groundwork of the act.
19. A case in Georgia very closely resembling Greenwood's case.
20. An insane delusion in regard to relationship of a legatee, avoids the will.
21. Careful definition of insane delusion.

n. 20. The opinion of Turley, J., in regard to peculiarity of religious belief.

22. The opinion of Shaw, Ch. J., as to unsoundness of mind.
23. Belief in many absurd notions will not defeat testamentary capacity.

§ 11. 1. MONOMANIA, as we have said, consists in a mental or moral perversion, or both, in regard to some particular subject, or class of subjects; while in regard to others, the person seems to have no such morbid affection. It is not supposed the mind is

altogether quiet, and sound, at such times, upon any subject; but apparently so upon some subjects, and not upon others. The development of its infirmity is exhibited, exclusively, upon particular subjects. The degrees of monomania are very various. In many cases the person is entirely capable of transacting any matters of business out of the range of his peculiar infirmity; and he often manifests considerable sagacity, and forecast, in keeping the particular subject of his delusions from the knowledge of others. But more commonly, he is not conscious of entertaining opinions different from the mass of men, even upon the particular subjects of his delusion; and refuses to be convinced of laboring, in any degree, under mental unsoundness.

2. It is this chiefly, which distinguishes monomania from mere eccentricity.[1] The eccentric man is aware of his * peculiarity, and persists in his course from choice, and in defiance of the popular sentiment, while the monomaniac verily believes he is acting in conformity to the most wise and judicious counsels, and often seems to have lost all control over his voluntary powers, and to be the dupe and victim of some demon, like that of Socrates.

3. One of the most unequivocal evidences of insanity, in many persons, is entire surrender of their wills, and the apparent submission to chance direction, or the caprices of others, or often to imaginary whisperings, which they seem to regard as the voice of supernatural wisdom and power. And this passiveness of the will often occurs in persons of the strongest understandings, and the most self-reliant. Some of the subjects connected with monomania are alluded to in the last section.[2]

*[1] Taylor, Med. Jur. 626, 6th ed. "It is only the belief of facts, which no sane person would believe, which is insane delusion." "That a person should believe something to exist which does not exist, and that he should act upon this * belief." Id. ed. 1861, 629; Dew *v.* Clark, 1 Add. 279; s. c. 3 Add. 79. Opinion of Sir *John Nicholl.* The learned author of the Medical Jurisprudence of Insanity, in a review of the first edition of this work, Journal of Insanity, April, 1865, 515, in questioning the former definitions of insane delusion, says, "If we may be allowed to try our hand at a definition of delusion, we should call it a belief in something impossible in the nature of things or the circumstances of the case." This is more cautious, perhaps, than the earlier definitions; but it does not seem to us very different in principle: and it is questionable whether its learned author will find it sufficiently comprehensive to embrace all cases of insane delusion. For many cases of delusion are none the less obviously morbid and the result of insane perversion, in that they are not absolutely impossible.

[2] Ante § 10. Dr. Taylor says: "The power which is most manifestly deficient

4. We have no occasion to go much into detail upon that species of monomania, which, by some writers, is denominated instinctive mania,[3] and by others, moral monomania, as it chiefly affects the moral sense.[4] The consideration of this form of insanity is important, chiefly, in the administration of criminal jurisprudence. It is not often that it can be called into action in the testamentary act.

5. But in regard to partial insanity, or what is properly * denominated monomania, because of its being confined to a particular subject, and sometimes to a particular object or person, many cases have occurred affecting testamentary capacity.

6. The case of Greenwood[5] is a remarkable one of this kind, where the testator was confessedly restored to his usual mental soundness, in regard to all subjects, and every person, except his brother, who, happening to be in some way mixed up with his insane fancies, while the paroxysm was upon him, he could never afterwards believe had not attempted to poison him, and disinherited him accordingly. The case was compromised, but was, as it seems to us, one of undoubted monomania.

7. The case of Drw *v.* Clark,[6] which excited great interest, * and

in the insane is generally the controlling power of the will." Med. Jur. 629. But we have known some marked cases of confirmed insanity, where the patient held such control of voluntary action, both of mind and body, as not to disclose any symptom of derangement to strangers.

[3] Ray, Med. Jur. of Insanity; § 163 et seq., p. 177 et seq., ed. 1860.

[4] Wharton & Stillé, § 185 et seq. This writer enumerates no less than nine distinct forms of this species of insanity, where the perceptive and reflective faculties seem entirely normal, and the moral sense, upon some particular subject, not only lost, but instead of it, an almost irresistible impulse to crime, as in homicidal insanity, or that which prompts to theft, arson, lying, suicide, fanaticism, or politics.

[5] White *v.* Wilson, 13 Vesey, 88; post, § 15.

[6] 1 Add. 279; 3 Add. 79. This decision was confirmed by the Court of Delegates, and a review applied for before the Lord Chancellor, and refused. 5 Russell, Ch. Cases, 163. Lord Chancellor *Lyndhurst*, in denying the review, makes some very pertinent suggestions, as to the general subject of partial insanity: "In this case I do not find any error in law, I do not find any doubtful or important question of law, which requires to be decided in any solemn form. The only point of law which has been agitated, has arisen out of an expression made use of by the learned judge in the court below. He speaks of *partial insanity;* and it was contended at the bar, that a case of partial insanity would not be a sufficient ground to lead a court to set aside, or to justify a court in setting aside a will; and that the doctrine of partial insanity is not known to the law of England. I think I am stat-

received a very thorough examination by one of the ablest judges of modern times, Sir *John Nicholl*, is worthy of an extended consideration. This was a case where a father, besides having some strange infatuations upon religious subjects, had conceived an insane antipathy against his daughter, and in consequence disinherited her.

8. The learned judge said, "She," [the daughter,] "must be appraised, however, as well, that the burden of proof rests with her, as that this burden, in my judgment, is, from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out, than Greenwood's case, in one respect, as the delusion under which this deceased is charged to have labored towards the complainant, is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although here, as in Greenwood's case, the general capacity is, in substance, unimpeached.

a. "But she must understand that no course of harsh treatment — no sudden bursts of violence — no display of unkind or even unnatural feeling, merely, can avail in proof of her allegation — she can only prove it by making out a case of antipathy, clearly resolvable into mental perversion, and plainly evincing, that the deceased was insane as to her, notwithstanding his general sanity."

b. After the evidence had been gone through on both sides, the

ing correctly the argument of counsel with respect to this point, according to the apprehension which I entertained of it, at the time when the term *partial insanity* was reiterated over and over again, as expressing the ground of Sir *John Nicholl's* judgment. But I think the argument, founded upon that phrase, proceeds upon a misapprehension of what was meant by the learned judge, who occasionally used it. I have read his judgment with great attention, and I collect from it, that his meaning is this, that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects. "It seldom happens," he says, "that a person who is insane, displays that insanity with reference to every question and every subject; it shows itself with reference to particular subjects, and sometimes with reference to only one individual subject; it sometimes displays itself with reference to one subject, very decidedly, and very generally, perhaps, with reference to other subjects." "All that the learned judge meant to convey was, that it was no objection to the imputation of unsoundness, that it manifested itself only, or principally, with reference to one particular question, or one particular person: and he illustrates his position by a variety of cases, some of them of public notoriety, and known to us all. This construction does not rest on any general reasoning, because, for the purpose of avoiding misapprehension, and, as if his attention had been directed to the very point, he himself, in the course of his judgment, explains in distinct terms what he meant by the term *partial insanity*."

same learned judge delivered his judgment; that the will * being proved to be the direct unqualified offspring of a morbid delusion, as to the character and conduct of the daughter, being the very creature of that morbid delusion put into act and energy, the deceased must be considered insane at the time of making the will, and consequently that the will itself was null and void in law.

c. In the course of this judgment the learned judge made the following remarks, on the subject of partial insanity. "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used that term. It was not meant, that a person could be partially insane and sane at the same moment of time: to be sane, the mind must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. In that sense the very same term is used by no less an authority than Lord Hale, who says: 'There is a partial insanity of mind and a total insanity. The former is either in respect to things quoad hoc vel illud insanire. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects, or applications. Or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless, most persons, that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences.' It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity toward the defects of human nature; or, on the other side, too great an indulgence given to great crimes."

* d. "The first point for consideration, and which should be distinctly ascertained, as far as it can be fixed, is, what is the test and criterion of unsound mind, and where eccentricity or caprice ends, and derangement commences. Derangement assumes a thousand different shapes, as various as the shades of human character. It shows itself in forms very dissimilar, both in character and degree. It exists in all imaginable varieties, from the frantic maniac chained

down to the floor, to the person apparently rational on all subjects and in all transactions save one; and whose disorder, though latently perverting the mind, yet will not be called forth except under particular circumstances, and will show itself only occasionally. We have heard of persons, at large in Bedlam, acting as servants in the institution, showing other maniacs and describing their cases, yet being themselves essentially mad. We have heard of the person who fancied himself Duke of Hexham, yet acted as agent and steward to his own committee. It is further observable, that persons under disorder of mind have yet the power of restriction from respect and awe. Both toward their keepers and toward others in different relations they will control themselves. There have been instances of extraordinary cunning in this respect, so much as even to deceive the medical and other attendants, by persons who, on effecting their purpose, have immediately shown that their disorder existed undiminished.

e. "It has probably happened to most persons, who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy, — maniacs, who though they could talk rationally, and conduct themselves correctly, and reason rightly, nay, with force and ability, on ordinary subjects, yet, on others, were in a complete state of delusion, — which delusion no arguments or proofs could remove. In common parlance, it is true, some say a person is mad when he does any strange or absurd act, others do not conceive the term 'madness' to be properly applied unless the person is frantic.

* f. "As far as my own observations and experience can direct me, aided by opinions and statements I have heard expressed in society, guided also by what has occurred in these and in other courts of justice, or has been laid down by medical and legal writers; the true criterion is, where there is delusion of mind, there is insanity; that is, when persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind: or, as one of the counsel accurately expressed it, 'It is only the belief of facts which no rational person would have believed, that is insane delusion.' This delusion may sometimes exist on one or two particular subjects, though, generally, there are other concomitant

circumstances — such eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptons which may tend to confirm the existence of delusion, and to establish its insane character.

g. "Medical writers have laid down the same criterion by which insanity may be known. Dr. Battie, in his celebrated treatise on madness, thus expresses it. After stating what is not properly madness, though often accompanying it, namely, either too lively or too languid a perception of things, he proceeds: 'but qui species alias veris capiet commotus habebitur;' and this by all mankind, as well as the physician; no one ever doubting whether the perception of objects not really existing, or not really corresponding to the senses, be a certain sign of madness: therefore 'deluded imagination is not only an indisputable, but an essential character of madness.'

h. "Deluded imagination, then, is insanity. Mr. Locke, who practised for a short time as a physician, though more distinguished as a philosopher, thus expresses himself in his highly esteemed work on the Human Understanding: 'Madmen having joined together some ideas very wrongly, mistake them for truths. By the violence of their imaginations, having taken their fancies for realities, they make right deductions from * them.' Hence it comes to pass, that a man, who is of a right understanding in all other things, may, in one particular, be as frantic as any in Bedlam. Madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them."[7]

i. "Here, again, the putting wrong ideas together, mistaking them for truths, and mistaking fancies for realities, is Mr. Locke's definition of madness; and he states, that insane persons will reason rightly at times, and yet still are essentially mad; and that they may be mad on one particular subject only.

k. "I shall refer to only one other medical authority; but he is a person of great name as connected with mental disorder, — I mean Dr. Francis Willis. In a recent publication by this gentleman, there occur passages not undeserving of my attention. The work is entitled, A Treatise on Mental Derangement, being the substance of the Gulstonian Lecture delivered before the College of Physicians in the year 1822, and published in the month of March,

* [7] This must be regarded as a very imperfect definition. For the insane as often reason incorrectly and imperfectly, as they are deluded by their perceptions.

1823. Preceding his work, he gives a list of authors whom he has consulted, and he seems to have referred to almost every writer on the subject, ancient and modern. He has also personally had great practice in the particular disorder, as well as the advantage of acquiring much knowlege from the distinguished experience of his family. I will first refer to a passage where he points out the difference between an unsound mind and a weak mind.

1. "'A sound mind is one wholly free from delusion. Weak minds only differ from strong ones in the extent and power of their faculties; but unless they betray symptons of delusion, their soundness cannot be questioned. An unsound mind is marked, on the contrary, by delusion, by an apparent * insensibility to, or perversion of, those feelings which are peculiarly characteristic of our nature. Some lunatics, for instance, are callous to a just sense of affection, decency, or honor; they hate those without a cause, who were formerly most dear to them; others take delight in cruelty; many are more or less offended at not receiving that attention to which their delusions persuade them they are entitled. Retention of memory, display of talents, enjoyment of amusing games, and an appearance of rationality, on various subjects, are not inconsistent with unsoundness of mind: hence, sometimes, arises the difficulty of distinguishing between sanity and insanity.'"

9. Whenever it appears that the will is the direct offspring of the partial insanity or monomania under which the testator was laboring, it should be regarded as invalid, though his general capacity be unimpeached.[8] This point is very happily illustrated by Mr. Justice *Sergeant:*[9] "If the erroneous and groundless * impres-

[8] Potts *v.* House, 6 Ga. 324; Townshend *v.* Townshend, 7 Gill, 10.

[9] Boyd *v.* Eby, 8 Watts, 71. See also Leech *v.* Leech, 11 Penn. Law J. 179. The substance of this last case is, that the belief in witchcraft and in witches is no ground of denying testamentary capacity. If it were so, Mr. Addison and other wise men, must have been regarded as insane. For, in the Spectator, it is said that it is impossible to deny the existence of witchcraft, although we do not credit any modern instance of its assumed existence. But the public opinion now regards it, as does Judge *King* in this case, as a very "absurd notion." But any one who attentively studies the history of the race, in regard to the occasional belief in manifestations of supernatural agency, through the instrumentality of evil spirits, ever since and before the days of the demonology of the New Testament, will scarcely be prepared to regard the belief in it, we think, as any sure indication of insanity. If Judge King had made this decision at the present time, he might have found a readier apology for the "absurd notion" of the testator, in the extensive belief, which now prevails, in the preternatural pretentions

sions, received during the time of this delirium, shall retain their hold, whether by some physical derangement of the brain, or by some indelible stamp on the thinking faculties, that person must be considered still under delusion — the effect continues, and it is only by effects that we can judge of the existence of the exciting cause — and if he is under a delusion, though there be but a partial insanity, yet if it be in relation to the act in question, it will invalidate contracts generally, and will defeat a will which is the direct offspring of that partial insanity."

10. A somewhat remarkable opinion was delivered by Lord *Brougham*, in an important case before the Privy Council, in which he takes the ground, that any person laboring under delusion, or monomania, to any extent or upon any subject, is not * to be regarded as competent to execute a valid will.[10] We have no

of modern spiritualism, than in the history of witchcraft before the American Revolution. But the question seems to have been raised in other cases, how far a belief in witchcraft would affect testamentary capacity. In Addington *v.* Wilson, 5 Ind. 137, it was decided, that a belief in witchcraft is not evidence of such insanity as disables a person from making a will. Lee *v.* Lee, 4 McCord, 183. We recollect having the question raised, before us at a trial term, how far a * belief in modern spiritualism, and spiritual manifestations, might be proved to discredit a witness. And we felt no hesitation in receiving the testimony, so far as to determine, whether that belief had any connection with the testimony, and of instructing the jury, that to that extent the testimony was proper to be considered by them, in determining the credibility of the principal witness. And upon another occasion, in a capital trial, where certain facts materially affecting the guilt of the prisoner had been shown, it was offered to be proved, that the facts were first discovered through the agency of dreams, as an indirect answer to the testimony, which we did not regard as admissible, the facts themselves being clearly established, by numerous witnesses, the belief of the first discoverer of them in the revelation of dreams did not seem important, and what this witness had incidentally mentioned in regard to such dreams, in the course of giving his testimony, was not to be treated as evidence in the case. The matter of the revelation of dreams was largely embraced in the trial of the Bourns, at Manchester, Vt., in 1816, who were convicted of the murder of one Colvin, upon their own confession, aided by the discovery of what some called human bones, through the mysterious leading of a dream, which was believed by the dreamer to be preternatural. But in this case, both the confession of the prisoners and the mysterious dreamer were convicted of falsehood, by the return of the supposed murdered man alive, after an absence of nearly twenty years from home and kindred. These facts may serve to show what extent of delusion may take possession of the rational mind, without any approach toward positive insanity.

* [10] Waring *v.* Waring, 6 Moore, P. C. Cases, 349, s. c. 12 Jur. 947. This decision is spoken of in this country, sometimes, as having introduced a new doctrine

apprehension that any such rule will permanently obtain currency in the English courts. It has certainly received no countenance in this country, and we should not be surprised if this opinion were never alluded to in the cases which shall hereafter occur in the English courts.

11. In the latest edition of Dr. Taylor's learned work upon medical jurisprudence, the case of Waring *v.* Waring is referred to, among others, upon the subject of partial insanity, but without comment. We do not perceive any manifestation of any change in the views propounded upon this subject in the English courts, or by medical writers there, which tends toward the result of any new rule having been introduced into English jurisprudence upon this subject, by that case or any other. We apprehend, that what was said by the learned ex-chancellor in that * case, upon this subject, will be regarded as nothing more than an extreme form of expressing what was regarded as a familiar truth before, that even partial insanity must be regarded as evincing a state of mind not free from morbid affections; and that where such affections existed it was not possible to limit their extent; or to affirm with confidence that the person was absolutely of sound mind in any respect.

12. Mr. Taylor records a considerable number of very marked cases, which have occurred in the English courts, upon the subject of monomania. He maintains the doctrine of partial insanity to the fullest extent, and that it need not be regarded as avoiding the

into English jurisprudence. Wharton & Stillé, Med. Jur. §§ 18, 20. But we have no belief that it will be so regarded, there. It will more probably be viewed as one of the ingenious speculations of its learned author. The question how far partial insanity, or monomania, should be regarded as affecting testamentary capacity, is carefully reviewed by the Supreme Court of Connecticut, in Dunham's Appeal, 27 Conn. 192, 204, and the cases very generally brought under discussion, with the following result: "That the notion that a single delusion is general insanity, and that the jury are to be so instructed, irrespective of the degree or intensity of it, is nowhere countenanced in this country, and not until lately in England." It is clear from the response of the judges in M'Naughten's Case, in the House of Lords, 47 Eng. C. Law Rep. 129, in n., that up to that time the clear distinction between partial and general insanity was abundantly established and universally recognized. Dr. Ray, in the last edition of his valuable work on insanity, § 279, in reference to the opinion of Lord *Brougham* in Waring *v.* Waring, says: "The attentive reader will not fail to see the lamentable inconsistency of the doctrine here put forth with that which the same person has promulgated in regard to criminal cases." It is manifestly impossible to reconcile any such extreme view, as that declared by his lordship in Waring *v.* Waring, with the generally received notions in the English courts upon the question how far insanity is an excuse for crime.

testamentary act, unless where it is in some way mixed up with the particular subjects of the testator's monomania.

13. Dr. Taylor also claims the extension of the same rule to cases of moral mania, where the will is to any extent the offspring of the perverted state of the affections. And of this, we think, there can be no question. The English courts, however, seem to have manifested a reluctance [11] to yield in any sense to the recognition of any such morbid affection as moral insanity.

14. The most remarkable case of mere eccentricity, upon record, if it was such, is that of Morgan *v.* Boys,[12] where the will was upheld, on the ground that there was no satisfactory proof of actual unsoundness of mind. The testator devised his property to a stranger, thus wholly disinheriting the heir, or next of kin, and directed that his executors should "cause some parts of his bowels to be converted into fiddle strings, — that others should be sublimed into smelling salts, and that the remainder of his body should be vitrified into lenses for optical purposes." In a letter, attached to the will, the testator said, "The world may think this to be done in a spirit of singularity * or whim, but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability, that so far from being imbecile, he had always been regarded by his associates through life, as a person of indisputable capacity. Sir *Herbert Jenner Fust* regarded the proof as not sufficient to establish insanity, it amounting to nothing more than *eccentricity*,[13] in his judgment.

15. In another case, where the probate of a will was resisted on the ground of insanity, and defended on the plea of eccentricity,[14]

[11] Frere *v.* Peacocke, 1 Rob. 442; s. c. 11 Jur. 247; 3 Curt. 667; 7 Jur. 998.

[12] Taylor, Med. Jur. 657, 1838.

[13] This must be regarded as a most charitable view of the testator's mental capacity, and one which an American jury would not readily be induced to adopt. We do not insist that the mere absurdity and irreverence of the mode of bestowing his own body, as a sacrifice, to the interests of science and art, in so bald and awful a mode, was to be regarded as plenary evidence of mental aberration. But we have no hesitation in saying, that a jury would be likely always to regard it in this light, in the case of an unnatural, or unofficious testament. And we are not prepared to say it should not be so. The common sense instincts of a jury are very likely to lead them right in cases of this character. The man who has no more respect for himself, or for Christian burial, than this will indicates, has no just claim to the regard or respect of others.

[14] Mudway *v.* Croft, 3 Curteis, 678; Taylor, 658.

Sir *H. J. Fust* said, "It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in the mind." And in another case, where the will was declared invalid by the Prerogative Court of Canterbury,[15] the decree was reversed on appeal by the Judicial Committee of the Privy Council. The testator was a native of England, but had lived in the East, and was familiar with eastern habits, and superstitions, and professed his belief in the Mahometan religion. He died in England, leaving a will, which after various legacies, gave the residue to the *poor of Constantinople, and also toward erecting a cenotaph in that city, inscribed with his name, and bearing a light continually burning therein. The Prerogative Court pronounced the testator to be of unsound mind, principally upon the ground of this extraordinary bequest, which sounded to folly, together with the wild and extravagant language of the testator, proved by parol. But on appeal it was held, that, as the insanity attributed to the testator was not monomania, but general insanity, or mental derangement, the proper mode of testing its existence was to review the life, habits, and opinions of the testator, and on such a review there was nothing absurd or unnatural in the bequest, or any thing in his conduct, at the date of the will, indicating derangement, and it was therefore admitted to probate.

16. Some wills, in the English ecclesiastical courts, have been refused probate, upon the ground of a disgusting fondness for brute animals, evinced by the testators during their lives, or in the testamentary act. In one case the testator, being a female unmarried, kept fourteen dogs of both sexes, which were provided with kennels in her drawing-room.[16] In another case, a female, who lived by herself, kept a multitude of cats, which were provided with regular meals, and furnished with plates and napkins.[17] This strange fondness for animals, in solitary females, is not altogether unusual, nor is it to be regarded as any certain indication of insanity.[18]

17. The marked distinction between eccentricity and insanity, in

[15] Austen *v.* Graham, 29 Eng. L. & Eq. 38.

[*16] Yglesias *v.* Dyke, Prerog. Court, May, 1852; Taylor, 658.

[17] Taylor, Med. Jur. 658.

[18] It would seem that these last cases of eccentricity, or unnatural fondness for animals, might be far more readily reconciled with mental soundness and testamentary capacity, than that of Morgan *v.* Boys, since experience shows that such harmless fondness for brute animals is not uncommon with solitary females, while that

the testamentary act, is, that the will of an eccentric man, * however strange and unaccountable it may seem, upon the ordinary grounds of human judgment and experience, is nevertheless such an instrument, as those acquainted with the character and conduct of the testator in former years, would be prepared, in some sense to expect. While on the other hand, the will of an insane man, especially where it is tinged with the peculiar coloring of the testator's fancies, or delusions, is often strangely at variance with all the leading characteristics of the testator, in his former healthy and sound condition. Eccentric habits, suddenly acquired, are properly regarded as evidence of insanity.[19]

18. The learned author of the treatise on Medical Jurisprudence to which we have so often referred, thus states the rule in regard to pronouncing on an instrument void by reason of delusion in the deed. "Delusion in the deed. — The validity of deeds executed by persons affected with monomania, often becomes a subject of dispute. The practice of the law here indicates, that the mere existence of a delusion in the mind of a person does not necessarily vitiate a deed, unless the delusion form the groundwork of it, or unless the most decisive evidence be given, that at the time of executing the deed, the testator's mind was influenced by it. Strong evidence is often derivable from the act itself, more especially where a testator has drawn it up of his own accord. In the case of Barton (July, 1840), the Ecclesiastical Court was chiefly guided in its decision by the nature of the instrument. The testator, it appeared, labored under the extraordinary delusion that he could dispose of his own property to himself and make himself his own legatee and executor! This he had accordingly done. The instrument was pronounced to be invalid. But a will may be manifestly unjust to the surviving relatives of a testator, and it may display some of the extraordinary opinions of the individual, yet it will not necessarily be void, unless the testamentary dispositions *clearly * indicate that they have been formed under a delusion.* Some injustice may possibly be done by the rigorous adoption of this principle, since delusion may certainly enter into a man's act, whether civil or criminal, without our being always able to discover it; but after all, it is

awful degree of irreverence towards one's own body is altogether without parallel in the history of ordinary life.

[19] Taylor, Med. Jur. 632, 656, 6th ed.

perhaps the most equitable way of construing the last wishes of the dead." [20]

19. The American courts have had this subject before them, in various forms. The case of Lucas *v.* Parsons,[21] very closely resembles Greenwood's case, in its characteristic features. The testator, during an attack of insanity, was most unfavorably impressed, and without any adequate cause, against his eldest son; and being, subsequently, in all respects restored to his reason, except in regard to this impression against his son, which he still retained, made his will, disinheriting his son, as the result of that impression, and it was held the instrument ought not to stand.

20. And where an insane delusion existed in the mind of the testator, in regard to the principal legatee being his son, the will being the offspring of this delusion, it was held invalid.[22] And where the testator is proved to have entertained an insane delusion in regard to one member of his family, some time before the making of his will, he must be shown to have recovered therefrom, before the date of the will, if the will be obnoxious to the presumption of having been produced or affected, by any such delusion, or it will be held invalid.[23] Where a man is insane in respect to his nearest relations and the disposition of his estate, he is incapable of making a will, notwithstanding he may be of sound mind in other respects.[24]

* 21. The case of Stanton *v.* Wetherax,[25] contains a careful and well-chosen definition of insane delusion. Whenever the person conceives something extravagant to exist, which has in fact no existence whatever, and he is incapable of being reasoned out of

* [20] Taylor, Med. Jur. 656.

[21] 24 Ga. 640. And it is said, in the American Seaman's Friend Society *v.* Hopper, 43 Barb. 625, that where the testator conceived the groundless delusion that his nephews had conspired to effect his death, and that one of them had actually caused it in the most absurd manner, by putting him upon a hot stove, and where the effect of this delusion was very apparent in the provisions of the will, it could not be maintained, although in most other respects he appeared to be of sound mind. A majority of the court were so confident of the inevitable result, that they declined to direct an issue to be tried by the jury.

[22] Florey *v.* Florey, 24 Alabama, 241.

[23] Jenckes *v.* Smithfield, 2 R. I. 255. See Townshend *v.* Townshend, 7 Gill. 10; post, § 12, pl. 4.

[24] Johnson *v.* Moore, 1 Litt. 371.

* [25] 16 Barb. 259.

this false belief, it constitutes insanity, and if this delusion regard his property he is incapable of making his will.[25]

A person is held competent to make his will in Kentucky, although irrational upon some points not touching the disposition of his property.[26] In Tennessee, it was held, that a person who believed, in reference to a future state of existence, that there were degrees of happiness there, and that in whatever circle a man lived, on earth, he would move in the same sphere in the future life; and that his preëminence there depended materially upon the amount of property he acquired here, and the charitable purposes to which he might have appropriated it, might make his will, and such opinions were no evidence of insanity.[27] It was further determined here, that no * belief as to future rewards and punishments, or the

[25] James *v.* Langdon, 7 B. Mon. 193.

[27] (20) Gass *v.* Gass, 3 Humph. 278. As this is a point upon which questions of sanity often arise, we insert the very judicious comments of Mr. Justice *Turley*. "There is proof in the record," said the learned judge, "tending to show that the testator held opinions somewhat peculiar in relation to futurity, to wit, that there were degrees in heaven; that whatever circle of life a man lived in on this earth, would be enjoyed by him in heaven; that his preëminence there depended materially upon the amount of property he acquired here, and the charitable purposes to which he might have appropriated it. This it is contended is delusion, and the court was asked to charge, that it was evidence of insanity sufficient to avoid the will. The court said, if a testator acts under a delusion which is the result of a disordered mind amounting to insanity, and the delusion influences the testator in the execution of his will, it will be sufficient to avoid his will; whether any particular delusion amounts to such an alienation of mind as will be esteemed insanity, is a question of fact for the jury to determine; if they believed that John Gass was under the belief that the doing some great charitable deed would advance him to a high state in * heaven, and that the delusion was so absurd and visionary as to amount to insanity, and executed his will under its influence, it would be sufficient to avoid it. This charge is objected to as being vague and uncertain. It is difficult to conceive how it could have been made more specific, without interfering with the province of the jury, whose right it is, as we have seen, to determine the question of insanity. The judge might perhaps have attempted to define what constitutes delusion, but this is a most difficult thing to do, and is but very unsatisfactorily done even by the most acute and metaphysical minds that have investigated it; he certainly could not legally have said that the points of belief avowed by the testator were delusion, because that would have been deciding the very question for the trial of which the jury was empanelled, for delusion is insanity. Shelford, in his treatise on the law of lunacy, says (p. 40), the true criterion, the true test of the absence or presence of insanity, where there is no phrenzy or raving madness, seems to be the absence or presence of delusion, that delusion and insanity seem to be almost convertible terms, so that a patient under a delusion on any subject or subjects, is for that reason essentially mad or insane on such subject or

principles of justice upon which they are to be administered, or other * religious creed, can be regarded as evidence of insanity, since there is no test by which their truth can be ascertained so subjects, to the extent of the delusion. In 3 Haggard, 598, 599, Sir *John Nicholl*, who is high authority, says: "That no case had ever come under his consideration, where insanity had been held to be established, without any delusion ever having prevailed, nor was he able exactly to understand what is meant by a lucid interval, if it did not take place when no symptoms of delusion can be called forth at the time." "If then, delusion be insanity, to charge that the proof established delusion, would be to charge that the insanity is proven, the question of fact to be determined; but the court was asked to charge, that it was evidence of insanity sufficient to avoid the will. The points of belief avowed by the testator are expressions of opinion, which opinion is either a delusion or not; if it be a delusion, it is direct insanity; if it be no delusion, there is no insanity, and of course it cannot be evidence of it. But who shall say that the opinion avowed by the testator, as to futurity, is a delusion. Delusion is defined to be, when a patient conceives something extravagant to exist which has no existence but in his own heated imagination, and having so conceived it, is incapable of being reasoned out of the conception, (Shelford on Lunacy, 40), as the fancying things to exist which can have no existence, and are impossible, according to the nature of things, as that trees walk, (Shelford, 293), the magnifying slight circumstances beyond all reasonable bounds, as if the parent of a child, really blamable to a certain extent in some particulars, takes occasion to fancy her a fiend, a monster, an incarnate devil, (Shelford, 41). We can comprehend the delusion of the man who fancied he was Jesus Christ, and kindly extended his forgiveness when asked, saying, I am the Christ; also his, who imagined he corresponded with a princess in cherry juice, and his, who dreamed dreams, and heard voices, directing him to burn York Minster Church. But we cannot comprehend a delusion upon a point of belief as to the nature of future rewards and punishments, and the principles of justice upon which they will be distributed. This is a subject beyond the ken of mortal man, and in one sense of the word, perhaps, every individual is laboring under a delusion who attempts to solve it. Yet there is no subject we are more disposed to theorise about, and about which there is a greater conflict of opinion. The fool hath said in his heart there is no God; and of course no future rewards and punishments; a dreadful error, yet no one apprehends that it amounts to insanity, and that he has not a disposing mind. The Turk looks to his heaven of sensual enjoyment, the Christian to his intellectual points of faith, differing as widely as the sources of their religion. Delusion in its legal sense cannot be predicated of either, and indeed of no creed upon the subject, because there is no test by which it can be tried. The testator's impressions are innocent and harmless at least, and for aught we can say, may be true. Charity in all its ramifications, is a theme upon which our Saviour, while on earth, dwelt again and again with marked emphasis, and enforced with the strongest promises of rewards and punishments. Upon this point there is no error." This man seems to have conformed his belief more to the conduct of men in general, than to their teaching and professed belief; upon the apprehension, possibly, that one's conduct is more satisfactory evidence of his real belief, than any declarations or professions he may make, which are at variance with his daily actions.

as to determine whether they are delusions, or not; and if not, whether they will yield to reason, or not.

22. *Shaw*, Ch. J., in Woodbury *v.* Obear,[28] said: "Evidence tending to show that the testator was of feeble mind, and believed in ghosts and supernatural influences, had some tendency to show unsoundness of mind, or that weakness of mind which would be easily imposed upon by the exertion of undue * influence." "Unsoundness of mind embraces every species of mental incapacity, from raging mania to that debility and extreme feebleness of mind which approaches near to, and often degenerates into idiocy." There is no inconsistency in a verdict which finds both that the testator was of unsound mind, and that he executed his will under undue influence.[28]

23. The fact that the testator sincerely believed in many absurd notions, such as mesmerism, clairvoyance, divining and mineral rods, dreams and spiritual influences, that he searched for the supposed deposits of money by Kid, and ascribed his failure to the utterance of certain words by the operator; that he saw the devil in the shape of a bull, and that he believed in certain charms for the cure of rheumatism and fever and ague, is no sufficient reason for setting aside a will in all respects rational.[29] The learned surrogate said: "In cases of unusual theoretic belief, it is important to inquire whether the belief has obtained the mastery of the mind, or whether it has been held in subordination to the judgment. "In the absence of fraud, or circumvention, so long as the testator is not an idiot, or a lunatic, he will not be denied the right" to dispose of his property by will.

[28] 7 Gray, 467.

[29] Thompson *v.* Quimby, 2 Bradf. Sur. Rep. 449; s. c. nom. Thompson *v.* Thompson, 21 Barb. 107. It is said, in the last report of the case, that where there is evident ground to infer from the will and the surrounding facts, that the testator must have exercised reason and judgment in the disposition of his estate, showing the possession and exercise of his logical powers, the will cannot be set aside because the testator entertained exaggerated and absurd opinions upon certain subjects.

SECTION XI.

DELIRIUM.

1. Definition and symptoms of delirium when produced by disease.
n. 1. Delirium, like a dream, often reproduces portions of the life long past.
* 2. Delirium produced by stimulus may incapacitate one during the paroxysm.
n. 2. Sir Wm. Grant's definition of the extent is that it deprives one of reason.
3. No presumption of the continuance of delirium exists as in case of insanity.
4. But if the will appear to be the natural result of a delusion once shown to have existed, it is invalid.

§ 12. 1. THE delirium of disease resembles mania, or ordinary insanity, very closely, sometimes, so that patients in fever have often been supposed to be insane, and as such, been removed to hospitals for the insane. But the delirium of disease is the direct and primary result of the disease, and rises or falls with the disease, and wholly ceases with restoration to health. It is attended with more prostration of the muscular powers, is more like a waking dream, is less affected by external preceptions, appears and disappears more suddenly as a general rule, and while it continues, is more marked and observable, in the countenance and the eyes; and it not unfrequently recalls the early impressions of childhood, or youth, in advanced life, so as to create a delusion in the mind of the patient, in regard to his locality, or the identity of persons by whom he is surrounded.[1] It most commonly ends in stupor, where the disease ends fatally, but not unfrequently is suspended, and the mind recovers a quiet condition for a considerable time before death.

2. Delirium from stimulus may be carried to such an extent as to incapacitate one for entering into contracts, or executing a valid will. This is so when the testator is incapable of doing the act understandingly. In cases of intoxication or habitual drunkenness, the rule adopted, both in the courts of law and equity, is, that the party is not to be held incompetent to do a * binding act requiring

*[1] Ray, Med. Jur. of Insanity, § 346–350; Taylor, Med. Jur. 1861, 632; Wharton & Stillé, § 235 et seq. In delirium one is found to soliloquize in the language of childhood, which he had not spoken for the period of a generation before. Dr. Rush mentions that the old Swedes, of Philadelphia, when on their death-beds, would always pray in their native tongue, though they had not spoken it for half a century. Rush on Diseases of the Mind, 282; Ray, Med. Jur. § 346 et seq.

consent, unless he is so completely under the dominion of delirium, as not to understand the nature of the business in which he is engaged, and so be rendered incapable of giving his consent, or else so much weakened in his capacity and purpose, as to be chiefly under the control of others.[2]

3. The same presumption of continued incapacity does not arise, from showing a person in a state of delirium, or intoxication, sufficient to incapacitate him for executing a will, as it does where the incapacity is shown to arise from mania, or monomania. But the presumption, being one of fact, is allowed to operate according to the probabilities of the case. In drunkenness, where the paroxysms are of short duration, unless the cause is renewed, and cease altogether with the removal of the cause, no presumption arises in regard to its continuance beyond the period of the operation of the cause, by which it was produced, without repetition or renewal.[3] So too in regard to delirium, its continuance cannot be presumed indefinitely, as in the case of ordinary insanity. It will be presumed to have ceased, after the lapse of such a period of time as commonly produces restoration from such affections.[4] A continuing * insanity is never to be presumed, where the malady, or delusion, under which the testator labored, was, in its nature, accidental and temporary.[5]

4. But where the will appears to be the natural result of such a delusion, as the testator is shown once to have labored under, this delusion being of a character calculated to pervert the judgment in respect to the disposition of his property, the testator cannot be regarded as possessing testamentary capacity, although in other respects he may have been rational and sane.

*[2] Wharton & Stillé, § 36 et seq.; Ray, Med. Jur. § 390. In Cooke *v.* Clayworth, 18 Vesey, 12, the general rule of courts of equity upon this subject is thus laid down, by an eminent equity judge, Sir *William Grant*, that relief from a contract will not be granted upon the ground of intoxication, unless where contrivances had been used to draw the party into it, or that extreme state of intoxication is proved, which deprives a man of his reason. And the same rule is maintained in the recent case of Shaw *v.* Thackray, 23 Eng. L. & Eq. 18, s. c. 17 Jur. 1045. And the following cases maintain substantially the same view. Cory *v.* Cory, 1 Ves. sen. 19; Barrett *v.* Buxton, 2 Aik. 167; King *v.* Bryant, 2 Hayw. 394; Campbell *v.* Ketcham, 1 Bibb, 406; White *v.* Cox, 3 Hayw. 82; Wigglesworth, *v.* Steers, 1 Hen. & Munf. 70; Taylor *v.* Patrick, 1 Bibb, 168.

[3] Black *v.* Ellis, 3 Hill (S. C.), 68.

[4] Hix *v.* Whittemore, 4 Met. 545.

*[5] Townshend *v.* Townshend, 7 Gill, 10.

SECTION XII.

SENILE DEMENTIA.

1. The most important and difficult subject connected with testamentary capacity.
2. The mind begins to decay very soon after its full maturity.
3. Loss of memory, one of the earliest symptons of mental decay, very uneqnal.
4. Correct opinions upon this subject require familiarity with the particular case.
5, and n. 3. Dr. Taylor's test. Reasons why witnesses should be watchful not to be deceived.
6. Old age should excite our watchfulness, but is not presumptive of want of capacity.
7. Extreme old age does not incapacitate where the act is rational and free.
8. Surrogate Brădford's rule in regard to wills executed by persons in extreme old age.
9. Defect of memory, unless upon essential matters affecting the act, does not incapacitate.
10. Chancellor Kent says, The will of an aged man ought to be regarded with great tenderness.

n. 10. Judge Bradford's reflections, and statistics upon old age.

11. The commentary of Dr. Ray upon senile dementia.
12. His strictures upon the practice of courts in leaving too much to juries.
13. The rule of Mr. Justice Washington quoted with approbation.
14. Experts do not remove all doubts in a case, more than other witnesses.
15, and n. 16. Where imbecility of mind and injustice concur in a will, it generally fails.
16. Great watchfulness against imposition in such cases, proper.

*§ 13. 1. THERE is probably no form of mental unsoundness which has to be considered so often, in connection with testamentary cases, or which has so important a bearing upon, or the thorough comprehension of which is so much to be desired, as an aid toward the correct understanding of, such cases, as that of the imbecility of old age, or senile dementia. There is nothing which more strikingly illustrates the incomprehensible nature of the connection and true relations, between the mind and the body, the spirit and the flesh, than the wonderful inequality in which different persons suffer abatement of the full vigor of their youthful and mature mind, at the approach of advanced life. While some persons suffer no apparent diminution of mental power, even to advanced old age, and after great loss of physical energy, and in some cases the occurrence of extreme feebleness; others become decidedly imbe-

cile, in mind, long before they cease to have full strength and ability to perform the most difficult and laborious offices of their usual occupations, except as they become embarrassed therein, by the loss of mental capacity.[1]

2. It is not our purpose to attempt any analysis of these surprising phenomena. In the majority of cases, probably, the mind begins to loose something of its elasticity and activity, very soon after the period of its fullest maturity. This is confessedly so in regard to our physical powers. There is more uncertainty in the estimate of the powers of the mind; since the increase of * experience and knowledge, which time produces at all stages of advancing life, in a measure compensates for the decline of the mental faculties and powers.

3. The loss of memory is one of the earliest and surest indications of the approach of mental infirmity. This approaches, with very unequal steps, in different persons. While in some it is scarcely perceptible, even at fourscore, in others it becomes a marked and serious infirmity, long before they reach the ordinary period of human life.

4. Casual observers, those but slightly acquainted with the person, are liable to very great misapprehension in regard to the mental capacity of aged persons. To a correct estimate upon this subject, it seems to be requisite that one should possess, not only general skill and experience upon the question, but that he should either have had long and familiar acquaintance with the particular person or at least an ample opportunity to observe the precise state of the mental powers, or that he should learn these facts accurately from others.

5. The rule for testing the mental capacity of a person to do an act requiring mental comprehension and disposing judgment, given

*[1] Ray, Med. Jur. § 336, ed. 1860. This experienced writer says: "The great point to be determined is, not whether he was apt to forget the names of people in whom he felt no particular interest, nor the dates of events which concerned him little; but whether, in conversation about his affairs, his friends and relatives, he evinced sufficient knowledge of both, to be able to dispose of the former with a sound and untrammelled judgment. It is a fact, that many of those old men who appear so stupid, and who astonish the stranger by the singularity of their conduct, need only to have their attention fairly fixed on their property, their business, or their family, to understand them perfectly well, and to display their sagacity in the remarks they make."

by Dr. Taylor,[2] is as reliable as any one perhaps. "If a medical man be present when the will is made," says this learned writer, "he may easily satisfy himself of the state of mind of the testator, by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances, without first assuring themselves of the actual mental condition of the testator. It would always be a good ground of justification, if, at the request of the witness, the testator had been made to * repeat substantially the leading provisions of his will from memory. If a dying or sick person [or any other one] cannot do this without prompting or suggestion, there is reason to believe that he has not a sane and disposing mind."[3]

*[2] Med. Jur. 658, ed 1861. See also, Hathorn *v.* King, 8 Mass. 371, where it was held, that being able to recall the particulars of the directions given the scrivener is evidence of testamentary capacity. Marks *v.* Bryant, 4 Hen. & Munf. 91.

*[3] We apprehend that what is here said in regard to the compromise of professional character, by becoming the witness to a will, where the testator is not in a proper condition to execute it, will be somewhat unintelligible to the American mind. The impression in England is, both in the legal and medical profession, that one is bound to give directions, on such occasions, in regard to what the testator is competent to do, and that the medical attendant is responsible that he do not countenance the act of attempting to execute a will, after the patient is incompetent to comprehend its import. That by consenting to become a witness of the act he virtually certifies that the testator is of sound, disposing mind and memory. That if such proves not to have been the fact, the character of the medical witness is seriously compromised, inasmuch as he is subjected to one or other of the alternatives resulting from the dilemma in which he is thus placed, either that he was incompetent to detect such incapacity, or else that, knowing of its existence he voluntarily connived at the creation of an instrument of great importance and solemnity, while the supposed actor was in a state of mental unsoundness which incapacitated him for its valid execution. Under such circumstances, the connivance may, with some show of reason, be regarded as implicating the medical witness in a virtual fraud upon the legal disposition of the property which would otherwise follow, since the attempt to execute a will, at such a time, is getting up the shadow of a legal instrument, the effect of which will be, if successfully carried through, to defeat legal rights which have already practically taken effect and become vested, when the simulated agent no longer possesses the capacity for voluntary action. It has always seemed to us there was great justice and propriety in the English view of the subject. We think any gentleman, whether professional or not, would feel delicacy and hesitation in regard to becoming a witness to such a transaction. But with us the public opinion, which is the sovereign arbiter of duty, assumes sometimes to override the dogmas of written

The language of *Walworth* Chancellor,[4] is well worthy of regard and remembrance; "No person is justified in putting his name,

law. It is thus, no doubt, that it has come to be understood here, by some at least, that the witnesses to a will are not to be regarded as having expressed any opinion in regard to the sanity of the testator. It seems to be supposed, that they are only witnesses to the act of signing. But when it is considered, that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different aspect. One who puts his name as a witness to the * execution of a will, while he was conscious the testator was not in the possession of his mental faculties, places himself very much in the same attitude as if he had subscribed, as witness, to a will which he knew to be a forgery, which every honorable man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable, that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a will, by one confessedly incompetent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood. We are certainly gratified to be able to give so charitable an explanation of what has always seemed to us a great, if not an inexplicable inconsistency or obtuseness, in the public sentiment upon this subject among the American people, in some sections of the country at least. We should surely be glad to do all in our power to correct what we regard as a discredit to the public sentiment, whether it be attributable to ignorance or insensibility. We mean, for a professional man, who is supposed to understand the subject fully and to be in a position in life where he may act independently, to nevertheless consent to become a witness to a will executed by one wholly incapable of comprehending its import. The language of Lord *Camden*, in his most able and elaborate judgment in the celebrated case of Hindson *v.* Kersey, 4 Burns, Eccl. Law, 85, 88, is of great significance upon this point: "And that the statute had a main view to the quality of the witnesses will appear from this consideration; namely, that a will is the only instrument in it (the statute of frauds) required to be attested by subscribing witnesses, at the time of execution. It was enough for leases, and all other conveyances, to be in writing: These were all transactions of health and protected by valuable considerations and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced to writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. And the only question that can be asked in this case is, Was the testator in his senses when he made it? And consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. What fraud are they to prevent? * Even that fraud so commonly practised upon dying men, whose hands have survived their heads; who

[4] Scribner *v.* Crane, 2 Paige, 147, 149. We are glad to be able to add this testimony of one of the most eminent of the American judges, in confirmation of our own views expressed in the next preceding note.

as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness, when he is dead, or is out of the jurisdiction of the court."

* 6. Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court.[5] But no just * inference could be made upon the question of capacity, from age merely, short of some extreme period; but, as is well said, "if a man in his old age becomes a very child again in his understanding, and is become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic."[6]

7. The American cases take a similar view of the effect of old age upon testamentary capacity. One eighty-six years old, and

have still strength enough to write a name or make a mark, though the capacity of disposing is dead. What is the condition of such an object, in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease? *Put to the laborious task of recollecting the full estate of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all and forgetting none.* . . . Who then shall secure the testator in this important moment from imposition? Who shall protect the heir-at-law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive, but here they are active, and in truth the principle parties to the transaction; the testator is intrusted to their care. Sanity is the great fact the witness is to speak to when he comes to prove the attestation, and that is the true reason why a will can never be proved as an exhibit, viva voce, in chancery, though a deed may; for there must be liberty to cross-examine to the fact of sanity." "From the same consideration, it is become the invariable practice of that court never to establish a will unless all the witnesses are examined, because the heir has a right to the proof of sanity from every one of them whom the statute has placed about the testator."

[5] Kinleside *v.* Harrison, 2 Phillim. 449.

[6] 1 Wms. Exrs. 36; Griffiths *v.* Robins, 3 Mad. 191; Mackenzie *v.* Handasyde, 2 Hagg. 211; Potts *v.* House, 6 Ga. 324.

afflicted with disease, was held competent to execute a will.[7] So also of one eighty years of age, with energies greatly impaired.[8] And in a case seriously contested,[9] where the testatrix * was ninety years old, it being shown that the deceased was of sound mind, that the will was in conformity to one executed six years before, when there was no question of her mental capacity, and also with her repeatedly declared intentions, both before and after the date of the last will; and that the provisions of the instrument were reasonable, and were carefully read and explained to the testator, at the time she executed the will; and it appearing that no concealment, deception, or influence had been used to procure the will, it was established. The surrogate, in giving his opinion, which was very minutely and carefully considered, thus concludes:

8. "Great age alone does not constitute testamentary disqualification; but, on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed, and the last will is in consonance with definite and long settled intentions, is not unreasonable in its provisions, and has been executed with fairness."

9. And in another important case,[10] the same learned judge held, that defect of memory, unless it be total, or appertain to things essential, is not sufficient to establish incapacity, and that advanced age, of itself, raises no presumption against the capacity of the testator; and quotes, as the basis of his judgment, the eloquent words of Chancellor *Kent*, in regard to the will of a person between ninety and one hundred years of age.[11]

[7] Watson *v.* Watson, 2 B. Mour. 74.

[8] Reed's Will, id. 79.

[9] Maverick *v.* Reynolds, 2 Bradf. Sur. Rep. 360.

[10] Bleecker *v.* Lynch, 1 Bradf. Sur. Rep. 458.

[11] Van Alst. *v.* Hunter, 5 Johns. Ch. 148. The remarks of Judge *Bradford*, in Bleecker *v.* Lynch, supra, in regard to the effect of old age, are worthy of repetition here: "The effect of age upon the vigor of the mind varies so much according to individual constitution, that it is difficult to form a sound general conclusion, on the mere fact of advanced age. In an intellectual sense, there is nothing in the mind, abstractly speaking, tending to decay; its loss of tone and power is consequent upon the ravages of time and disease upon the body, and especially the brain, upon which the understanding is dependent for manifestation. It is said that not more than seventy-eight in one thousand die of old age; and it is scarcely possible to define the natural period of life, or its more frequent and regular limit, independent of disease and accident. Blumenbach observes, that, by an accurate

* "A man may freely make his testament, how old so ever he may be. . . . It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life, to command the attention due to his infirmities. The will of such an aged man, ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections, dictated." [11]

11. One of the ablest and most experienced writers upon the jurisprudence of insanity, Dr. Ray, has made some strictures * upon the mode of conducting jury trials, where questions affecting mental capacity are to be determined, which we deem not unworthy of being repeated here. They have particular reference to a cause tried in the State of Maine.[12] "No one," says this able

examination of numerous bills of mortality, he had ascertained the remarkable fact, "that a pretty large proportion of Europeans reach their eighty-fourth year." Haller gave a list of two hundred and twenty-one persons who lived from one hundred to one hundred and sixty-nine years; Easton, a list of one thousand seven hundred and twelve, who attained a century and upwards. The condition of the mind, in these cases, of course varied. In Madden's six tables of the ages of the most distinguished modern philosophers, jurists, artists, and authors, and in D'Israeli's Notes on "the progress of old age in new studies," there are the names of many men whose genius shone in full splendor to the close of an advanced life. I do not mean to gauge all cases by such remarkable instances, but advert to them to show that each individual must be judged by himself. The power and brilliancy of the mind in old age is an exception, but so is longevity itself. It may be observed, in this connection, that the system frequently makes an effort at renovation in extreme old age, which is evinced in the cutting of teeth, the recovery of the original color of the hair, and of perfect vision and hearing. This is said to occur more frequently in females, and indicates tone and strength in the nervous system, great vital power, and recuperative energy. A fact of this kind occurred to the decedent, who, about the time the will was made, recovered her vision, was able to read without spectacles, and to thread the finest needle.

* [12] Ray, Med. Jur. §§ 342, 343, 344. Since the publication of the first edition of this work, the case of Neal, here referred to, has undergone a further judicial investigation in regard to the validity of a deed executed about three months earlier than the will: and the result was the opposite of that in regard to the will; the validity of the deed being sustained by the verdict of the jury. More than twenty years had intervened between the two trials, and the point of the testimony had become somewhat blunted, no doubt. But the chief ground of the difference in the result is, probably, the different consequences of the verdicts in the two cases; in

and learned writer, "at all acquainted with the habits of old age, and with the effect of senile dementia on the mind, can entertain the one, it set aside the will, and thus prevented the diversion of the testator's property from his children to public charities, to a considerable extent; and in the other, it merely confirmed the validity of a conveyance to a bonâ fide purchaser for full value.

In regard to this latter consideration, Mr. Justice *Davis*, of the Supreme Judicial Court, before whom the case was tried on the last occasion, says, "I do not make this remark to discredit the verdicts of juries. I think they are far more reliable than experts on the subject of insanity. If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly; but upon the question, whether it had, at a given time, reached such a stage, that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country."

A distinguished expert testified on the last trial, "that, if the testimony on one side was true, that upon the other must be false." In regard to which the judge adds, "I have seldom tried a case in which all the witnesses upon this point, upon both sides, appeared so reliable, both for their honesty and their intelligence. And I was forced to the conclusion, that the expert was mistaken, and that the substance of the testimony on both sides was true. If so, in this, as in all other cases, theories must yield to facts."

We should not have deemed it requisite to confirm what we have felt bound to say in this chapter, in regard to the unreliable character of the testimony of medical experts, upon questions of mental capacity, by reference to the testimony of other judges, if we had not been assured by medical gentlemen of the highest character, both for ability and fairness, that our strictures were regarded by them as unjust, and couched in terms of too unmitigated plainness of speech; for all which we feel sincere regret. There is no class of men for whom we entertain more unaffected respect. But they certainly do labor under a serious misapprehension, if they suppose that what is here said in regard to the substantial benefit to be derived from the largest proportion of medical testimony, in relation to testamentary capacity, and in determining questions of that character, is peculiar to the author of this treatise. We feel confident that the opinion of the judiciary is largely in that direction. If there is any thing in the language which we have adopted calculated to give needless pain, it was surely our misfortune; and no one could regret it more than ourself, since it would, at the same time, have a most disastrous effect, both upon ourselves and our argument.

But we desire to repeat here, what is elsewhere discussed more at length, that the opinion of the inutility of the testimony of medical experts upon questions of insanity, or mental capacity, arises chiefly from the fact, that so many gentlemen of about equal experience testify so diametrically opposite to each other, upon all the leading points of a case, without being able to assign any reason satisfactory to the common mind, why they should be brought to such different results, and leaving no satisfactory mode of explaining it, except that which applies equally to counsel, — that they have been selected to present the strongest view of the side by

a doubt of the testator's competency to make his will. True, he was more forgetful of the present than of the past; he frequently forgot what he had just before said or done; and he sometimes disregarded the common observances of life. All this, however, may be said of multitudes of old men whose competency for any business is never questioned by those who know them best. However weak may have been the mind of this old man, he was still acquainted with the value of property, especially of his own; he recognized his relatives and friends, was always aware of the exact nature of their relations toward him, and of their respective claims on his bounty; he still was capable of feeling the sting of filial ingratitude, and of being actuated by motives of ordinary prudence and discretion. If his mind were not sufficiently vigorous to engage in contracts and speculations of large magnitude, it was none the less able to bequeath his property, the kind and amount of which he perfectly understood, to relatives and friends whom he still recognized and loved. The will was a rational act, rationally done, and there was not a tittle of evidence to show that the testator was under improper influences.

12. "The court, at each trial, refrained from any comments on

which they are summoned. We are far from regarding this as any impeachment of veracity; for we believe any counsellor, fit to be trusted, would say the same in favor of his client, upon oath, which he says without oath, if called to state the claims and views upon one side only. It is this which has induced us to urge a different mode of selecting experts, so that they should regard themselves as assistants to the court and jury. But we fear it will be long before any such course will be adopted in the American states.

We cannot well comprehend why our former or present commentary, upon the character of the testimony of medical experts in regard to testamentary capacity, as affected by mental perversion, or unsoundness, should excite any special sensitiveness in the minds of that class of witnesses. We can comprehend well enough, that there are many gentlemen of that class of experts, who are entirely capable of presenting both sides of a case, and holding the balance precisely even between them; but we believe that it is not so with the majority of men, of any class, when exposed to the perverting influences of one-sided views and arguments, and, above all, one-sided statements of facts, by those in whom they have been accustomed to confide. There are very few men who will not be more or less rendered partial, if not partisan, by such influences; and all that we desire is, to remove all temptation to swerve in a class of testimony which is becoming so controlling in regard to subjects so vast as that of testamentary capacity and criminal responsibility. Our only apology for saying so much is the sincerity and earnestness of our desire to see something done which shall relieve the courts from consuming so much time to so little purpose.

the evidence relating to the testator's mental condition, and the jury were left to their own unenlightened and unassisted deliberations. There were peculiar reasons, perhaps, for taking this course, in the present case, but we may be allowed to question its propriety as a general rule of practice. In cases like * these, which are characterized by the abundance and discrepancy of the evidence, it needs a cool, tenacious, and intelligent mind to recapitulate this evidence; to sift, to analyze, weigh, and, finally, stamp it with its proper value. The jury, it is true, are sole judges of the facts, and if the question here were, whether certain facts offered in evidence were true or false, not a remark might be required of the court. But since they have to do with a very different question, that is, whether these facts warrant certain inferences relative to mental capacity, they are unable to answer it correctly, we apprehend, without the light that is derived from superior penetration and attainments. The knowledge necessary for this purpose is of a technical kind, which a jury cannot be expected to possess, and the very abundance of the evidence is calculated to fill their minds with uncertainty and confusion. If they can hear the opinions of experts — of persons who have given especial attention to this branch of knowledge — respecting the precise value of all these facts, considered in relation to the point they are designed to establish, then, indeed, they would be in a condition to form conclusions of their own. But since this is not always practicable, are they to be left to float about on a sea of conjecture, without star or compass to guide their course? Must a jury, not one of whom, perhaps, ever observed a case of insanity, or even studied the operations of the sane mind, take upon themselves to say, that certain facts do, or do not, prove the presence of testamentary capacity; in other words, to decide upon professional questions of acknowledged difficulty? The really intelligent and conscientious juror, distracted by an appalling mass of evidence, much of which is irrelevant and contradictory, which he may try in vain to unravel and arrange, and puzzled by questions he never considered before, will and ought to look to the court for assistance.

13. "The principle laid down by the court, at the first trial, that a *disposing mind* means 'so much mind and memory as would enable him to transact common business with that * intelligence which belongs to the weakest class of sound minds,' may be theoretically correct, but it seems to be of too abstract a nature to be

practically applied by jurors. To compare one mind with another, of different calibre, is a task for which they are altogether unfitted by their previous tastes, habits, and studies. Justice, merely, requires that the strength of the mind should be equal to the purpose to which it is applied. If this simple principle be distinctly presented to the minds of the jury, there are few so dull as to be unable to give it a practical application. It is not only reasonable, but it has the merit of having been repeatedly recognized in courts of law, until it has now obtained all the force of established authority. 'He may not have sufficient strength of memory and vigor of intellect, to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will.' [13] 'A man may be capable of making a will, and yet incapable of making a contract, or to manage his estate.' " [14]

14. We do not suppose medical experts would be able to instruct jurors in the law of insanity, much more understandingly than it is commonly done by courts. The great uncertainty in the result of such trials, depends more upon the contradictory nature of the evidence than this learned writer is probably aware of. And it is impossible often for any one to say, with much certainty, upon which side the testimony is really entitled to the most credit. And unfortunately for the regrets here expressed, in regard to the absence of medical experts, who could * place all doubts and uncertainties upon this perplexing subject, in such a light, as to remove all difficulty, experience has shown, both here and in England, that they differ quite as widely in their inferences and opinions, as do the other witnesses. That has become so uniform a result with medical experts, of late, that they are beginning to be regarded much in the light of hired advocates, and their testimony, as nothing more than a studied argument, in favor of the side for which they have been called. So uniformly has this proved true, in our limited experience, that it would excite scarcely less surprise, to find an *expert*, called by one side, testifying in any particular, in

[13] Stevens *v.* Vancleve, 4 Wash. C. C. 262.

[14] Harrison *v.* Rowan, 3 Wash. C. C. 580. In regard to these commentaries, contained in the charges of Mr. Justice *Washington*, upon the subject of testamentary capacity, this learned writer says: "Nowhere has the subject of testamentary capacity been treated with so much good sense and regard to scientific truth, as in the charges of the court from which the above quotations are made. With the progress of sound views on this subject, the correctness of the principles there laid down will only be the more firmly established."

favor of the other side, than to find the counsel upon either side arguing against their clients,[15] and in favor of their antagonists.

[15] We do not intend by this to cast the slightest reflection upon the integrity of medical or other experts. There is little doubt they are as upright and independent as any other class of men. But they are mortal, and being so, they are liable to see all subjects through the refracting lens of interest and partiality. They are applied to and employed, the same as the counsel, and paid, or should be, for their time in examining the case, at professional prices, and all with a view to find good reason for bringing the cause to the result desired by those who employ them. It is not wonderful, therefore, that upon subjects of so much uncertainty, they should fall into the line of opinion most favorable to that side, whose case has been so often urged upon their favorable consideration. In addition to this, there will always be such marked conflict in the testimony as to facts, that it is commonly next to impossible to know which is right, and the expert is always expected, of course, to assume the theory of the facts maintained by the side calling him. This, of itself, is enough to throw the experts world wide apart in the results of their opinions and speculations. We recollect a case tried before us, not many years back, which is of no great interest, except as illustrating the point to which we have just been alluding. The case was one where the son had subscribed his father's name, as surety, to his own note, as he claimed, by his father's consent. It was claimed in defence, that the father had been, for years before the date of the note, a mere imbecile, and wholly incapable of comprehending any such transaction, as he confessedly was, for some years before his death. The testimony was very voluminous, and strangely conflicting. It was proved, on the part of the plaintiff, that the old man understood that his name was to be subscribed to the note, and also that it had been done, that he repeatedly cautioned his son not to let his father be injured by it; and that he told the creditor he was secure, since he had his name, and that he was, at the time of the execution of the note, abundantly capable of comprehending this and other similar business transactions.

On the other hand, it was proved by multitudes of the most unimpeachable witnesses, that for a long time before the date of this note, the old man was in the daily habit of doing and saying things, which it was not easy to reconcile with any such remaining mental capacity, as was requisite to make a binding contract. As that he could not feed himself, did not recognize his own children whom he met daily, would turn his tea into his plate at table, would get lost in his own house, sit down on the floor, follow his wife from room to room, holding on to her dress like an infant child, exhibiting the most boisterous grief upon the slightest occasion, or none at all, and not unfrequently attempting to build a fire in the middle of the room, with some other things too disgusting to be named, but strikingly indicative of imbecility. We submitted the case to the jury upon the mere question of fact, whether the deceased had capacity at the time to understand the nature of the transaction, and consented to have his name attached to the note, and a verdict was given for the plaintiff. It was a mere question of fact upon the credibility of the testimony upon the different sides, and no rule of medical law could aid the jury. It was impossible to believe the testimony on both sides. The inquiry was, which is the most probable? The testimony made a case free from

* 15. It seems to be the result of all the cases, English and American, that intellectual feebleness alone will not disqualify one for making a will. But there is a large class of cases where the testaments of aged people come in controversy, that the element of undue influence, imposition, and fraud, is mixed up with the weakness and imbecility of mind of the testator. In such cases, courts and juries should be reasonably watchful to see that no improper influence has been exercised, in the production of an unjust or unequal distribution of the testator's * property. In other words, that if the will was executed, at a time when the testator was in a condition of mind susceptible of being easily controlled, and the will itself is one giving unequal advantages towards parties in a position to have brought their influences to bear upon the testator, the triers of its validity have a right to require those, thus exposed to suspicion, to prove, with reasonable certainty, that the will was the offspring of the free agency of the testator. Hence it is very properly said, that where a will is just and equal, and displays reason, memory, and benevolence [and we should add, justice], and the same was made without advice or dictation, it may be regarded, as satisfactory evidence, that it was the product of a disposing mind.[17]

16. We shall here give a short but pertinent extract from the able work of Dr. Taylor:[18] "I am indebted to a learned judge for the following note: Another case may be noticed which often occurs in the experience of lawyers, and to which, in attendance on aged persons, medical gentlemen do not sufficiently attend. A

all question, for both sides. Our own experience convinces us that this is a not uncommon result.

[16] Elliot's Will, 2 J. J. Marshall, 340; Dornick *v.* Reichenback, 10 S. & R. 84; Blanchard *v.* Nestle, 3 Denio. 37. It is here said, there must be a total want of understanding to render one intestable, and that the expression "of unsound mind" in the New York statute means the same as non compos mentis.

[17] M'Daniel's Will, 2 J. J. Marshall, 331. Our own experiences, after having had knowledge of a considerable number of this class of cases, would induce the conclusion, that juries are generally inclined to sustain the wills of very aged and very infirm persons; and often, of those in extreme sickness, almost in articulo mortis, where the deed itself is rational and just. But that where this is not the fact, juries are very willing to be convinced of some good reason to set the will aside, and more commonly succeed in finding some excuse, satisfactory to themselves for doing so; and we have never felt that this tendency among juries was either unnatural or unjust.

[18] Med. Jur. 659.

person's mind in extreme old age may be quite intelligent, his understanding of business clear, and his competency to converse upon and transact such, undoubted, and his bodily strength good; but there may grow upon him such a fear and dread of relatives who may have surrounded him, and on whom he may have become perfectly dependent, that his nervous system is wholly overcome, and he becomes a mere * child and tool in the hands of those about him, so that he has no power to exert his mind in opposition to their wishes, or to resist their importunities. His mind is enslaved by his fears and feeling of helplessness, so that to that extent, and in matters in which he may be moved by them, he really is facile and imbecile. This state of things seems, in great old age, easily brought on; the faculties are otherwise entire, and the bodily strength considerable. This state of a party's mind at a great age (93 or 94) was exhibited in a remarkable manner in a case from Scotland, which went to the House of Lords (Cairns *v.* Marienski)."

SECTION XIII.

LUCID INTERVALS.

1. There is great difficulty in giving a clear distinction between a lucid interval and a mere intermission.
n. 2. Dr. Taylor's definition of the proper difference.
2. Where the will is executed during a lucid interval, the proof of restoration to reason must be clear.
3. Lord Thurlow's definition: "The mind must have thrown off the disease, and recovered its general habit."
n. 4. There must be something more than the mere succession of paroxysm, and relaxation.
4. The Chancellor De Aguesseau's definition, that it must be a temporary cure.
n. 5. Classification and definition of the different forms of temporary relief from the disease.
5. The clearest distinction between lucid intervals and remission, consists in the length of time, and the exemption from delusion.
n. 6. The suggestions of Dr. Combe in regard to lucid intervals.
6. The English cases do not seem to require a perfect restoration, to constitute a lucid interval.
7. It seems to be matter of fact in each particular case, whether the testator was so far restored as fully to comprehend the nature and effect of the transaction.
8. When settled insanity is once established, the law presumes its continuance.
9. There is a marked difference between lucid intervals, in delirium, and general insanity.

n. 12 Lord-Chancellor Erskine's definition of the onus probandi.
*10. The American cases have taken the same ground as the English.
11. Wills claimed to have been executed during lucid intervals should be carefully scrutinized.
12. Suicide is no certain evidence of insanity, at the time.
n. 16. Judge Bradford's commentary on lucid intervals.
13. The etymology of the term would lead us to consider a lucid interval, as a temporary restoration.
14. Late decisions in the English Court of Probate.
n. 19. Rule as to payment of costs out of the estate.

§ 14. 1. In mania, but not commonly in the other forms of mental unsoundness, there occur, what have been called, lucid intervals, wherein the subject is capable of executing, understandingly, a will. This is more readily understood by experienced persons, than accurately defined, in terms. The most approved English writer upon medical jurisprudence,[1] seems to suppose that there is a well-defined distinction, capable of being observed and maintained, between the mere remissions of mania, and a lucid interval.[2] But in his exposition of the subject, either from its innate obscurity, the paucity and imperfection of terms by which to define it, or because the distinction is not well taken, he does not succeed in making it altogether appreciable to common apprehension.[3] We believe that no intelligible definition of the distinction between a remission of the disease, and a lucid interval, can be given, except as it is made to depend upon duration and degree.

2. It is undoubtedly requisite, that the return of soberness and reason, should continue so long as to give some satisfactory assurance, that the person is really in possession of the ordinary * healthy current of thought and memory, so as to be able to rectify his present perceptions and opinions, by his former experience and judgments. And while it is a recognized principle, in the history of insanity, that it is more or less intermittent in its character, the intermissions are so unequal in different cases, and partake so much of the peculiarities, both of the disease, and the constitutional habits of the patient, that it is, as it seems to us, impracticable to lay down any

*[1] Dr. Taylor, Med. Jur. 651, ed. 1861.

[2] Taylor, Med. Jur. supra. "By a lucid interval we are to understand a temporary cessation of the insanity, or a perfect restoration to reason. This state differs entirely from a remission, in which there is a mere abatement of the symptoms."

[3] This same writer, in his final definition, says, that nothing more is intended, by a lucid interval, than that the patient shall become entirely conscious of his acts, and capacity.

reliable theory upon the subject. The person must have, so far, and for so long a time, regained the possession of reason, as to satisfy the mind that he really did comprehend the act; and that this was the understanding of a healthy mind, and not the mere freak of a disordered fancy.[4]

3. This subject is as clearly defined as it is susceptible of being, in the case of Attorney-General *v.* Parnther,[5] by Lord Chancellor *Thurlow*. "By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit."

*4. Others have defined it with more variety of figure and circumlocution, as the Chancellor *D'Aguesseau*, in his argument for the Abbe d'Orleans: "It must not be a superficial tranquillity, a shadow of repose, but on the contrary, a profound tranquillity, a real repose; it must be, not a mere ray of reason, which only makes its absence more apparent when it is gone, — not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal, — not a glimmering, which joins the night to the day, but a perfect light, a lively and continued lustre, a full and entire day, interposed between two separate nights, of the fury which precedes and follows it; and to use another image, it is not a deceitful and faithless stillness, which follows or forbodes a storm, but a sure and steadfast tranquillity, for a time, a real calm, a perfect serenity; in fine, — it must be, not a mere diminution, a

[4] Taylor, Med. Jur. 651, 652. "Lucid intervals sometimes appear suddenly in the insane.... The duration of the interval is uncertain; it may last for a few minutes only, or may be protracted for days, weeks, months, and even years. In a medico-legal view its alleged existence must always be looked upon with suspicion and doubt, when the interval is very short." The person in a lucid interval, should be able to talk of the subject and nature of his delusion, without producing excitement, or confusion of ideas, or uncertain apprehension in regard to individual consciousness. The sense of double consciousness is a sure indication of illusion.

[5] 3 Brown, Ch. C. 444. We do not understand, from what Lord *Thurlow* here says, that it is required, that the person shall be restored to perfect health, before mental capacity and responsibility return. That would be difficult to show, in any case, short of absolute cure, which is not required. But something more should exist, to constitute a lucid interval, than such a periodical relaxation of the disease, as occurs in a quotidian fever, where chills and fever are succeeded by a state of comparative ease, for a short but limited period.

remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health." [6]

[6] Evans, Pothier on Obligations, App. 579. Some writers have attempted to distinguish the different classes of relaxations to which insanity is subject, by distinct terms, as, —

Lucid intervals, by which they understand, an approximation toward perfect restoration of mental soundness, but not of mental strength;

Remission, which differs from the former in degree only;

Alternation, which is where the mind changes from one form of insanity to another, as from mania to depression, and vice versa.

Intermission, where the disease recurs at more or less regular periods, and continues for a time and then disappears. Some curious illustrations occur in regard to the periodicity of insanity. We find cases where the disease recurs at precisely the same hour each day, and after continuing for a definite time disappears. Of two women, one was afflicted precisely nine days in each month, and the other, two days. Wharton and Stillé, § 255. Dr. Rush, in his treatise on the Mind, 162, 163, gives some curious illustrations of the inexplicable freaks of mental unsoundness, which tend to throw light upon this subject. "The longer the intervals between the paroxysms of madness, the more complete is the restoration to reason. Remissions, rather than intermissions, take place where the intervals are of short duration, and these distinguish it from febrile delirium in which intermissions more generally occur. In many cases, every thing is remembered that passes under the notice of the patient, during a paroxysm of general madness, but in those cases where the memory is diseased, as well as the understanding, nothing is recollected. I attended a lady in the month of October, 1802, who had crossed the Atlantic ocean during a paroxysm of derangement, without recollecting a single circumstance of her voyage any more than if she had passed the whole time in sleep. Sometimes every thing is forgotten in the interval of a paroxysm, but recollected in a succeeding paroxysm. I once attended the daughter of a British officer, who had been educated in the habits of gay life, who was married to a Methodist minister. In her paroxysms of madness, she resumed her gay habits, spoke French, and ridiculed the tenets and practices of the sect to which she belonged. In the intervals of her fits, she renounced her gay habits, became zealously devoted to the religious principles and ceremonies of the Methodists, and forgot every thing she did and said during her fits of insanity. A deranged sailor, some years ago, in the Pennsylvania Hospital, fancied himself to be an admiral, and walked and commanded, with all the dignity and authority that are connected with that high rank in the navy. He was cured and discharged: his disease, sometime afterwards, returned, and with it all the actions of an admiral, which he assumed and imitated in his former paroxysm. It is remarkable, that some persons when deranged *talk* rationally, but *act* irrationally, while others act *rationally* and talk *irrationally*. We had a sailor, some years ago, in our hospital, who spent a whole year in building and rigging a small ship in his cell. Every part of it was formed by a mind apparently in a sound state. During the whole of the year, in which he was employed in this work, he spoke not a word. In bringing his ship out of his cell, a part of it was broken. He immediately

* 5. From all this and a great deal more, which might be adduced, from writers, who have maintained the essential distinction, and elemental difference, between a lucid interval and a mere remission of mania, we think it natural to conclude, that the only practical and intelligible distinction, which can be stated, between them, must be predicated of its clearness and apparent exemption from delusion, and longer continuance, on * the one hand; or its shorter duration and indistinctness of apprehension, upon the other.[7]

6. It is certainly not required by the English courts of chancery, that one should be absolutely restored to his former state of mind, in order to do a valid and responsible act. It is said to have been so laid down, by Lord Chancellor *Thurlow*, in Attorney-General *v.* Parnther,[8] but that is distinctly qualified in later cases.[9] But the illustration put by his lordship in the last case referred to,[9] of one being reduced to a state of extreme weakness, by the delirium of fever, is certainly not a very perfect illustration of the subject. It shows, indeed, that one's reason may return, while great weakness

spoke, and became violently deranged soon afterwards. Again, some madmen *talk* rationally, and *write* irrationally; but it is more common for them to utter a few connected sentences in conversation, but not be able to connect two correct sentences together in a letter. Of this, I have known many instances in our hospital."

[7] Ray, Med. Jur. § 376 et seq.; Combe, Ob. on Mental Derangement, 241. The views of this learned writer, which are fully adopted by Dr. Ray, are not unworthy of repetition here.

"But, however calm and rational the patient may appear to be, during the lucid intervals, as they are called, and while enjoying the quietude of domestic society, or the limited range of a well-regulated asylum, it must never be supposed, that he is in as perfect possession of his senses, as if he had never been ill. In ordinary circumstances, and under ordinary excitement, his perceptions may be accurate, and his judgment perfectly sound; but a degree of irritability of brain remains behind, which renders him unable to withstand any unusual emotion, any sudden provocation, or any unexpected and pressing emergency. Were not this the case, it is manifest, that he would not be more liable to a fresh paroxysm, than if he had never been attacked. And the opposite is notoriously the fact; for relapses are always to be dreaded, not only after a lucid interval, but even after a perfect recovery. And it is but just, as well as proper, to keep this in mind, as it has too often happened, that the lunatic has been visited with the heaviest responsibility, for acts committed during such an interval, which, previous to the first attack of the disease, he would have shrunk from with horror."

[8] 3 Brown, C. C. 441. That does not appear in the authorized report of the case, but in Hon. Mr. Eden's note, 3 Brown, C. C. 445, and in the report of Lord Chancellor *Eldon's* opinion, in ex parte Holyland, 11 Vesey, 11.

[9] Lord *Eldon*, in ex parte Holyland, supra.

of body continues. But delirium is, as we have said,[10] a wholly distinct affection from * mania, or general insanity, and commonly comes and goes, with the febrile symptoms, which constitute both its primary and proximate cause.

7. But it is no doubt true, in regard to all mental unsoundness, that lucid intervals occur while the patient is laboring under extreme feebleness from the effects of the disease, and while there is the strongest probability of the recurrence of the paroxysms. Lord *Eldon* well said, in Ex parte Holyland,[9] "There may be frequent instances of men restored to a state of mind inferior to what they possessed before; yet it would not be proper to support commissions of lunacy against them;" much less to deny them the capacity to execute a valid will, which may often be done while under such a commission. And Sir *William Grant*, in Hall *v.* Warren,[11] defines the rule, in regard to lucid intervals, more moderately than some judges, in regard to the degree of restoration which is required.

8. The presumption is, after insanity is once shown to exist, that it continues, unless it be the effect of delirium.[12] So that the party, who alleges a lucid interval, assumes the burden of proof.[13] But

[10] Ante, § 12. See Dr. Ray's comments upon this very point. Med. Jur. of Insanity, § 388 and note, ed. 1860.

[11] 9 Vesey, 611. In referring to the rule laid down by Lord *Thurlow*, he says: "If general lunacy is established, they will be under the necessity of showing, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party to judge soundly of the act."

[12] Ante, §§ 5, 12. But, after restoration to apparently perfect soundness, no more presumption of insanity arises in the case of the execution of a will than if the testator had never been affected in that way. Snow *v.* Benton, 28 Ill. 306. But, unquestionably, where well-defined insanity is once shown to exist, it will always be more liable to recur than in those where no such tendency is shown; and its existence will be established by less stringent proof.

[13] White *v.* Wilson, 13 Vesey, 87. Lord Chancellor *Erskine's* views in regard to the nature of the requisite proof in such cases, are worthy of being attentively studied: "Where the party has ever been subject to a commission, or to any restraint, permitted by law, even a domestic restraint, clearly and plainly imposed upon him, in consequence of undisputed insanity, the proof, showing sanity, is thrown upon him; on the other hand, where insanity has not been imputed, by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side; which is not to be made out by rambling through the whole life of the party; but must be applied to the particular date of the transaction.

"A deviation from that rule will produce great uncertainty. In such a case as this, therefore, it must be shown, that a man exercising all these great public duties,

the law requires no particular measure of proof, to establish the existence of such a state of mind. But it must * be sufficient to encounter and overcome the presumption which naturally arises in the mind, after the person is once shown to have been in a confirmed state of mental unsoundness, that such state will continue.

9. There is an essential difference between the apparently lucid intervals in delirium, and in general insanity. In delirium, for the most part, the periods of apparent return to reason are real and unquestionable, while those which seem to occur in mania are delusive, the patient being, as really laboring under the powers of the malady, as in the more distinctly marked periods of its progress.[14]

10. The American cases seem to have gone much upon the same ground in regard to the competency of persons to execute a valid will, during a lucid interval, with that already indicated. It was held in South Carolina,[15] that the will of a testator who * was insane, both before and after its execution, was sufficiently established, the jury having found that it was executed during a lucid interval, and in Pennsylvania,[16] it was held that an act done in a lucid interval, by one who has been found to be a lunatic, is binding on him, but the proof of such lucid interval must be clear.

11. This question was examined with great thoroughness and discrimination by the learned surrogate of New York in a recent case.[17] It is here held, that where a disease, ultimately * affecting

which it was proved this testator did exercise, had, nevertheless, a morbid image in his mind upon a particular subject, so wide from sound understanding and clear reason, the distinction of a sound mind, that he ought not to be considered as in that state. In my experience, I know only one instance of a verdict of lunacy under such circumstances; which is the case of Mr. Greenwood; who was bred to the bar; and, as Lord Chedworth did, acted as chairman at the Quarter Sessions: but, becoming diseased, and receiving in a fever a draught from the hand of his brother, the delirium, taking its ground then, connected itself with that idea; and he considered his brother as having given him a potion, with a view to destroy him. He recovered in all other respects: but that morbid image never departed; and that idea appeared connected with the will; by which he disinherited his brother. Nevertheless, it was considered so necessary to have some precise rule, that, though a verdict had been obtained in the Court of Common Pleas against the will, the judge strongly advised the jury to find the other way; and they did accordingly find in favor of the will. Further proceedings took place afterwards, and concluded in a compromise."

[14] Brogden *v.* Brown, 2 Add. 445.

[15] Wright *v.* Lewis, 5 Rich. 212.

[16] Gangwere's Estate in re, 14 Penn. St. 417.

[17] Gombault *v.* Public Administrator, 4 Bradf. Sur. Rep. 226. "Among the most

the mind, was insidious and slow in its progress and development, and there was ground for suspicion that before the factum the possible approach of mental derangement had been apprehended, there should be the most watchful scrutiny of an act done shortly before the most undoubted symptoms of such derangement, in order to see whether it was a rational and natural act, and conformable to the views and wishes of the party in health. That a will made in a lucid interval may be valid, but the facts establishing intelligent action must be shown. The nature and character of the instrument, and of its dispositions, have great influence in determining the mind of the court, as to the capacity of the decedent at the time; and it is important to ascertain whether the provisions of the will harmonize with the state of the testator's affections and intentions otherwise expressed. The inclination of the courts will commonly be, under such circumstances, to sustain a reasonable and probable act.

12. Suicide committed by the testator soon after making his will

mysterious of the phenomena of the human mind, is the variation of the power and orderly action of the faculties, under different circumstances and conditions, and at different times; and especially mysterious is the oscillation from insanity to sanity, the rational power often fluctuating to and fro, until reason ultimately settles down firmly upon her throne, or falls, never again to resume her place in this life. Without speculating upon this interesting theme, it is sufficient to say that the law recognizes the fact established by experience, and does not hesitate to ratify the validity of a transaction performed in a lucid interval; though it is exacting in its demands, and scrutinizing in its judgment, of facts adduced to exhibit and demonstrate intelligent action at the time of the event under investigation. The principle is thus stated in the Institutes, *Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur* (*Quibus non est permissum facere testamentum, lib.* 2, *tit.* 12, § 1). And it has been fully admitted in its broadest extent in the ecclesiastical courts. White *v.* Driver, 1 Phillim. 84; Chambers *v.* The Queen's Proctor, 2 Curteis, 415. There can be no doubt that during an intermission of the disease the testamentary capacity is restored.

" Sir William Wynne remarks, that 'the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself: . . . if it can be proved and established that it is a rational act, rationally done, the whole thing is proved.' Cartwright *v.* Cartwright, 1 Phillim. 90. Without, however, acceding to the entire length and breadth of this view, it must be admitted that the nature and character of the act which is the subject of criticism, must have great influence in determining the mind of the court in its judgment of the case. It is also worthy of remark, that a lucid interval is more easily established in cases of delirium, or fluctuations arising from temporary excitement, or from periodicity in the attacks of the diseases, than in cases of habitual insanity."

is not conclusive evidence of insanity.[18] It seems to be abundantly settled by repeated decisions, both in this country and in England, that suicide is no certain evidence of the existence of insanity at the time of the act.[19]

* 13. It is proper to bear in mind, when inquiring in regard to the true import of a lucid interval, that the very etymology of the term "interval," seems to imply, that the disease is interrupted, and, for the time, broken up; and that there is interposed between the two portions of the diseased state, coming before and after the period in question, an interval, or space of time, of more or less duration, but sufficient in which to do the act under investigation, which evinces, to all appearance, the healthy action, or brilliancy of mind, restored to its accustomed healthy state, so that but for the recurrence of the disease, we might fairly conclude the patient had recovered.

14. The subject of lucid intervals has been before the English Court of Probate many times within the last few years. In a case, occurring in 1859,[20] it was held, that, where a person, afflicted with

[18] Brooks *v.* Barrett, 7 Pick. 94.

[19] Taylor, Med. Jur. 680, 681. Where the testator committed suicide three days after the making of his will, there being no evidence of insanity before the factum, it was held no obstacle to the probate. Burrows *v.* Burrows, 1 Hagg. 109. The law draws no inference against the sanity of a person, from the mere fact of suicide. Duffield *v.* Robeson, 2 Harring. 375. But this is a fact for the court and jury to weigh. Id. In Chambers *v.* Queen's Proctor, 2 Curt. 415, the testator committed suicide on the morning after the day on which he made his will, and a similar fact existed in the case of Duffield *v.* Robeson, supra, and the wills were established. Taylor, Med. Jur. 680, thus concludes his review of the question: "From these cases one point is clear, the act of suicide is not treated by the law as a necessary proof of insanity."

No doubt, where suicide occurs soon after making a will, it is a fact sufficiently tending to establish an unsettled state of mind, and inducing so much * apprehension of the existence of some morbid affection tending to derangement of reason, as to be competent to be submitted to the consideration of the jury upon an inquiry into the question of testamentary capacity; and it should beget watchfulness in the mind of the triers in regard to the true state of the testator's mind at the time of making the will, where suicide occurs so soon after. But there are so many cases where suicide is committed in a perfectly sane state of mind, that it cannot, in itself, be regarded as proof of unsound mind."

[20] Nichols *v.* Binns, 1 Swab. & Trist. 239. It was said, in this case, that the will, being made under remarkable circumstances, and such as would justify the next of kin in calling upon the executor to prove it in solemn form; that, nevertheless, the next of kin, having put the executor to a very expensive trial, after

habitual insanity, with intermission, makes a will, the fact that the will is a rational one, and made in a rational * manner, though not conclusive, is strong evidence of its having been made in a lucid interval. It was also here determined, that, where a person is laboring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion; but, where a person is afflicted with habitual insanity, unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals.

SECTION XIV.

PERSONS UNDER DISABILITIES FROM CRIME, CAPTIVITY, ETC.

1. The long list of disabilities enumerated by Swinburne.
2. These have become obsolete in England except treason and felony.
3. In the United States it never was of any importance as respects wills.
4. Felo de se in England does not forfeit estate, or right to make will.

§ 14 a. 1. If we look into the early treatises on wills,[1] we find a formidable array of persons disqualified from making such an instrument. Slaves, villeins, captives, prisoners, traitors, felons, heretics, apostates, manifest usurers, incestuous persons, libellers, suicides, or "wilful killers of themselves," outlawed persons, excommunicated persons, prodigals, he that sweareth not to make a testament, he that is at the very point of death, ecclesiastical persons, and "whether the king may bequeath his *kingdome* to whom he will."

she had received from them full and complete information in regard to its execution, that she was not entitled to have her costs out of the estate.

So, also, where the heir asked and obtained an issue to try the validity of the will, after being aware that it had been established in the ecclesiastical courts as to the personalty, she was not entitled to have her costs paid out of the estate, having failed in the trial, but that the proceeding was not so decidedly vexatious, as to subject her to the payment of costs. Stacey *v.* Spratley, 4 De G. & J. 199. And a similar rule as to costs prevails in the American states. In New Jersey, an executor propounding a will for probate, acting in good faith, is entitled to costs out of the estate, whether probate be granted or refused. Perrine *v.* Applegate, 1 McCarter, 531. The question of costs is here very extensively discussed.

* [1] Swinb. pt. 1, § 7 et seq.

2. Of this long list of disqualifications, almost all have become obsolete, in England even. The latest edition of Jarman,[2] only names traitors and felons. These rest upon the forfeiture of * the estate, which is now either abolished or restricted to forfeiture during the life of the offender, in most cases, by statute.[3]

3. Forfeiture of estate for crimes has either been wholly abolished in the United States, or so much restricted, as to be of such rare occurrence, as not to require discussion here. We have named the subject merely as a matter of interest, in marking the relaxation of penal consequences in modern times.[4]

4. The question has recently been decided in England, in regard to persons felo de se ; that freeholds of inheritance, of which such persons are seized at the time of their death, do not escheat to the crown, but pass to the heir at law ;[5] and that where one deceased, after having duly executed her will, and the coroner's jury returned a verdict of felo de se, the will of such person was entitled to probate.[6]

[2] 1 Jarman, 37.

[3] 54 Geo. 3, ch. 145. High treason, murder (and accessories to murder before the fact), and petit treason, are excepted from this statute. But the latter offence is since abolished by statute, and the two former are reduced within such narrow limits, practically, as to be of no importance in a general treatise upon wills.

[4] 2 Kent, Comm. 385, 386.

[5] Norris *v.* Chambres, 7 Jur. N. S. 59.

[6] The Goods of Eliza Bailey, 7 Jur. N. S. 712.

*CHAPTER IV.

MENTAL CAPACITY REQUISITE TO EXECUTE A VALID WILL.

1. Old rule, that one insane word in a will rendered it void. Now, matter of fact.
2. Wills wanting in natural affection, viewed with suspicion.
3. One, under guardianship, presumed incompetent to execute a will. Rule in equity. The rule stated as it obtains in the American courts, and the English ecclesiastical courts.
4. One may be incompetent to execute a will, and not before considered fit for guardianship.
5. He must know the extent of his property, and the objects of his bounty.
6. Some cases hold mere weakness of mind not sufficient to incapacitate testator. Cases apparently conflicting.
7, 8, and 9. If the mind be not morbidly affected, and comprehends the business, it is sufficient to enable one to execute a valid will.
10. Statement of cases affecting testamentary capacity.
11, and n. 30. Important case in Connecticut, Mr. Justice Ellsworth's opinion.
12. The point of decision in some of the American cases given.
13. The doctrines enunciated in the Parish Will case.
14. Commentary upon the American cases continued.
15. The final result of the review of the cases by Mr. Justice Davies.
16. We can give no better rule than that adopted by Mr. Justice Davies.
n. 45. Review of the case of Stewart *v.* Lispenard, by Mr. Justice Davies.
17. The question very fairly stated by Swinburne.
18. The real inquiry, in all such cases, is, Whether the instrument propounded for probate, be really the *will* of the testator, or of some other person, or persons? Whether the act be his, or that of another?
19. If the testatrix has capacity to give directions for preparing her will, and recollection of those directions at the time of executing it, she is to be regarded as of sound mind.
20. The point well illustrated by a late case in Pennsylvania.
21. One under interdiction presumed incompetent to execute a will.
22. But this presumption may be overcome by counter evidence.
23. But the testimony before the inquest of interdiction not revisable.

§ 15. THE MENTAL CAPACITY required in the execution of a will, has been necessarily, to some extent indicated in the * preceding chapter in speaking of the different classes of persons, mentally incompetent for such office. But something more positive is certainly desirable upon so important a subject.

1. It seems to have been a standing rule of the ecclesiastical courts in England, while they held the jurisdiction of the subject,

to treat all wills, as prima facie invalid, which were absurd in themselves, or as it was expressed, in the quaint language of some of the early writers, "if there be but one word sounding to folly."[1] But this must be regarded as little more than a presumption of fact, since it is every day's experience, that a sensible man, in the fullest, most unquestionable possession of all his mental powers, sometimes will make the strangest, most unaccountable disposition of his property, without, and indeed contrary to, all supposed motive, to be deduced from any process of fairly conducted a priori reasoning.[2]

2. And although the English law does not absolutely regard inofficious wills, or those wanting in natural duty and affection, as void, yet it will, in such case, view the execution of such an instrument, with some degree of suspicion and jealousy; so far at least as to require clear proof that it was really executed according to instructions, and with the full concurrence of the testator, and while he was in possession of such a degree of mental soundness, as to be able to comprehend its import.[3] * And this is especially to be required, where the will is drawn up at the instance, or in the handwriting, of a party to be benefited by it.[4]

3. In later times, the Court of Chancery in England is accustomed to put persons under commissions of lunacy, in many cases, where they cannot be regarded as absolutely insane; such commissions are applied to cases of imbecility of mind, to the extent of

* [1] Swinb. pt. 2, § 3, pl. 16; 1 Wms. Exrs. 34. This rule is not more sweeping than that which was attempted to be established by Lord *Brougham*, in Waring *v.* Waring, 6 Moore, P. C. C. 349, that any degree of mental perversion rendered the testamentary act void.

[2] Arbery *v.* Ashe, 1 Hagg. 214. The English law does not admit the querela inofficiosa, of the Roman law, by which all wills which omitted altogether the mention of any of the testator's children, or which disinherited them, without cause, were to be set aside, upon the presumption that the testator was insane, or otherwise incompetent to execute a will. Nor is it requisite that the testator should assign any reason for disinheriting the heir. 2 Bl. Com. 502, 503. Voluntas stet pro ratione.

[3] Wrench *v.* Murray, 3 Curteis, 623; Montefiore *v.* Montefiore, 2 Add. 361, 362; Dew *v.* Clark, 2 Add. 207, 208; Brogden *v.* Brown, 2 Add. 449.

* [4] Raworth *v.* Marriott, 1 Myl. & K. 643. But see Russ *v.* Chester, 1 Hagg. 227; Martin *v.* Wotton, 1 Cas. temp. Lee, 130, where such wills are held valid, even in extremis. In Baker *v.* Batt, 2 Moore, P. C. C. 317, it is said, a will written by a legatee is not void on that account, but the fact is to be regarded with suspicion. The presumption against the will is fortified by proof of the mental weaknes or imbecility of the testator. Vreeland *v.* McClelland, 1 Bradf. Sur. Rep. 394.

incapacity, whether from disease, age, or habitual intoxication.[5] All that is requisite is, that it should appear that the person is not in a fit condition to have the management of his pecuniary affairs.[5] In Ex parte Cranmer,[6] Lord Chancellor *Erskine* describes the requisite incapacity to subject one to a commission of lunacy, thus: "The party must be one, whose 'understanding is defunct,' who has 'survived the period that Providence has assigned to the stability of his mind.'" Lord *Eldon*, in Sherwood *v.* Sanderson,[7] thus states the rule: it must appear "that the object of the commission is of unsound mind, and incapable of managing his affairs." In all cases, where the person is regarded as a fit subject of a commission of lunacy, he is prima facie incompetent to execute a will, and one so executed, will not commonly be established by the courts, unless its provisions are altogether reasonable and provident, and in accordance with the previously expressed intentions of the party, while of sound mind.

*4. And while some of the cases hold, that a man might not be a fit subject of a commission of lunacy, and still be incompetent to execute a will;[8] it is apprehended that the general opinion is in an opposite direction, as already stated. There are however, no doubt, cases, where there had existed no general evidence of the incapacity of the testator, sufficient to put him under guardianship, independent of the will itself, and where, nevertheless, such shreds of evidence as did exist, in connection with a will, characterized by the most flagrant departures, in all its most important provisions, both from reason and duty, as well as from the former declared purposes and intentions of the party, that a jury have felt compelled to the conclusion of incapacity in the testator, and have disallowed the will upon that ground. And courts, under such circumstances, have refused to interfere.[9]

5. The party must not only be able to answer simple questions, by an affirmative or negative, intelligibly; but, as is said by Lord Coke,[10] he must have a "disposing memory," or a "safe and perfect memory." By this, we understand one that is capable of present-

[5] Ridgeway *v.* Darwin, 8 Vesey, 65. Opinion of Lord Chancellor *Eldon*.

[6] 12 Vesey, 445, 452.

[7] 19 Vesey, 280, 286. It is here said, by Lord *Eldon*, that the testimony in such cases should come from medical men.

[8] Mountain *v.* Bennet, 1 Cox, 356.

[9] Taylor, Med. Jur. 648.

[10] 6 Co. Rep. 23, case of the Marquis of Winchester.

ing to the testator all his property, and all the persons, who come reasonably within the range of his bounty.[11]

6. But, as we have before repeatedly intimated, no inference is hence to be made, that mere weakness of understanding, in a healthy, sane mind, in a sound body, is to be adduced, as any impediment to the valid execution of a will. We have no * instruments, by which we can assume to measure the extent of mental capacity. Each case will have to be decided upon its own peculiar facts and circumstances, and somewhat, too, upon the peculiar bias and theory of the triers of the facts. Hence, the decisions do not wear the appearance of uniformity, or consistency. It is impossible they should be consistent, when they have to be made, by such a variety of courts, acting upon such contrariety of facts, and circumstances. Even the decisions of the same court, or the same judge, do not always appear to others, as they seemed to themselves, to harmonize with each other either in regard to matters of law, or of fact, and especially the latter.[12]

7. Some of the American cases seem to require something more than a general imbecility of mind, to invalidate the execution of a will.[13] The result of the best considered cases upon the subject seems to put the quantum of understanding requisite to the valid execution of a will, upon the basis of knowing and comprehending the transaction, or in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about.[14] Hence, a nervous temperament, and eccentric habits, are not enough, in themselves, to prove insanity.[15] And great deliberation and care in making a will, even in cases where the testator

[11] Harwood *v.* Baker, 3 Moore, P. C. C. 282, 290; 1 Wms. Exrs. 37; Herbert *v.* Lounds, 1 Ch. Ca. 24; Dyer, 72 a, in marg.; Right *v.* Price, 1 Doug. 241; Ball *v.* Mannin, 3 Bligh, N. S. 1; S. C. 1 Dow & Clark, 380; M'Diarmid *v.* M'Diarmid, 3 Bligh, N. S. 374; Sir *John Nicholl*, in Marsh *v.* Tyrrell, 2 Hagg. 122, and in Ingram *v.* Wyatt, 1 Hagg. 401; Constable *v.* Tufnell, 4 Hagg. 465; S. C. 3 Knapp 122.

[12] Osmond *v.* Fitzroy, 3 Peere Wms. 129.

[13] Stewart *v.* Lispenard, 26 Wendell, 313. This case, as we shall see hereafter, is not now followed in New York.

[14] Sloan *v.* Maxwell, 2 Green, Ch. 572. Old age, failure of memory, or habitual drunkenness, will not constitute incapacity to execute a will. Whitenack *v.* Stryker, 1 Green, Ch. 11; Van Alst *v.* Hunter, 5 Johns. Ch. 158. In Sloan *v.* Maxwell, 2 Green, Ch. 581, it is said, the power of making a valid will is not impaired by the approach of old age. So also, in Lowe *v.* Williamson, 1 Green, Ch. 82.

[15] Mercer *v.* Kelso, 4 Grattan, 106.

had been, for a considerable period in a state of habitual insanity, is generally regarded as strong evidence of capacity to do the act.[16]

* 8. Some of the early American cases took an extreme view upon this point, requiring absolute idiocy to invalidate a will.[17] It is said, in some cases, that no very great share of reason is necessary to make a valid will, where there is no fraud or imposition.[18] In others, that the mind and memory need not be wholly unimpaired;[19] that a man may, from age and failing memory, be incapable of understanding all parts of a contract, and yet may be able to direct the distribution of his property by will.[20] Perfect capacity to execute a will, has been defined to be such that a person talks and discourses rationally and sensibly, and is fully capable of any rational act, requiring thought, judgment, and reflection.[21]

9. But the lowest amount of capacity requisite to the execution of a valid will, is that the testator was able to comprehend the transaction. It is said: "If he be not totally deprived of reason, he is the lawful disposer of his property."[22] If one be able to transact the ordinary affairs of life, he may, of course, execute a valid will.[23] The testator must have something more than mere *passive* memory. He must retain sufficient *active* memory to collect in his mind without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in regard to them. The elements of such a judgment should be the number of those who are the proper * objects of his bounty, their deserts, with reference to conduct, capacity, and need, and what he had before done for them, and the amount and condition of his property. It will be obvious, that even this amount of capacity may often be, more or less, clouded and obscured, and still the will be

[16] Lee *v.* Lee, 4 McCord, 183.

[17] Dornick *v.* Reichenback, 10 Serg. & Rawle, 84.

[18] Heister *v.* Lynch, 1 Yeates, 108.

[19] Andress *v.* Weller, 2 Green, Ch. 604; Butlin *v.* Barry, 1 Curteis, 614; s. c. 2 Moore, P. C. C. 480.

[20] Stevens *v.* Van Cleve, 4 Wash. C. C. 262.

[21] Duffield *v.* Robeson, 2 Har. 384.

[22] Burger *v.* Hill, 1 Bradf. Sur. Rep. 360, 362, citing Stewart *v.* Lispenard, 26 Wendell, 255; Blanchard *v.* Nestle, 3 Denio, 37; Clarke *v.* Sawyer, 2 Comstock, 498. But these cases are not, perhaps, entirely sound.

[23] Tomkins *v.* Tomkins, 1 Bailey, 92; Coleman *v.* Robertson, 17 Ala. 84.

established, where it possesses no inherent incongruities, or defects, and is in strict accordance with the testator's previously declared purposes and intentions.[24] And in Horne *v.* Horne,[25] it is said, it is sufficient if the testator knew what he was doing, and to whom he was giving his property.

10. And it has been held, that neither peculiarity of character, weakness of understanding, or want of capacity to transact the ordinary affairs of life, will disqualify one to execute a will.[26] But imbecility, short of insanity, will sometimes disqualify one.[27] It was offered in one case to show that the testator had inherited a large estate, which she had very essentially diminished, as evidence of want of testamentary capacity.[28] But the learned judges disposed of this evidence by referring to the authority of Holy Writ, that the race is not to the swift, nor the battle to the strong, nor riches to men of understanding. It is painful to reflect upon what absurd grounds the wills of * deceased persons will sometimes be attacked. But the courts are commonly found sufficiently favorable to the upholding of all reasonable testamentary acts. And in one case it was decided, that capacity to make property and take care of it was evidence of sanity in the testator, but not conclusive.[29] But it is proper to remember, that the capacity to make and take care of property, is more satisfactory evidence of testamentary capacity, than the want of that power would be of the want of testamentary capacity.

11. In a late case,[30] after an elaborate and careful review of * the

[*24] Converse *v.* Converse, 21 Vt. 168; ante § 9, n. 2. The rule here established is, that to the validity of a will, the testator must, at the time of execution, have been of sound disposing mind, that this does not imply that the powers of the mind have not been weakened, or impaired, by disease, or old age; that it is not sufficient that the testator was able to answer questions rationally, nor was it necessary that he should have been of sufficient capacity to engage in complex and intricate business; if he was at the time capable of understanding the nature of the business and the elements of the will, that is, the nature and extent of his property and the persons to whom he meant to convey it, and the mode of distribution, it was sufficient.

[25] 9 Iredell, 99. This is about as accurate and brief a definition as can be given.

[26] Potts *v.* House, 6 Ga. 324; Stubbs *v.* Houston, 33 Ala. 555.

[27] McTaggart *v.* Thompson, 2 Harris, 149.

[28] Hall *v.* Hall, 17 Pick. 373.

[*29] Gass *v.* Gass, 3 Humph. 278.

[30] Dunham's Appeal, 27 Conn. 192. Mr. Justice *Ellsworth* here presents an

decisions, by a very learned and experienced judge, it was determined, that although the testator had some insane delusions, upon some subjects, fancying things to exist which have no existence, and of whose existence he had no reasonable evidence, yet if he has mind enough to know and appreciate his relation to the natural objects of his bounty, and the character and effect of the dispositions of his will, then he has a mind sufficiently sound to enable him to make a valid will.

12. In regard to the testamentary capacity of a dying man, the fact of an occasional flightiness, or wandering of intellect, during his sickness, is generally esteemed of very slight importance.[31] The New York cases, until a late date, and many others, following their lead, have held, that loss of mind, short of its total absence or perversion, will not destroy testamentary capacity.[32] If the testa-

array of eminent persons who, nevertheless, held opinions not now regarded as tenable, by the majority of sober-minded people. "Lord Hale had full belief in the existence of witches, while he presided with distinguished ability in the King's Bench. Dr. Johnson was confident he heard the voice of his deceased mother calling his name. Lord Castlereagh, a short time before his solemn death, gave a narration of a supposed apparition, which he firmly believed, and which deeply affected him. Lord Herbert believed that a divine vision had indicated to him the correctness of a course of religious speculations." — "The second Lord Littleton was equally persuaded that a divine warning had admonished him of his approaching death. The same was true of the Earl of Chesterfield. Abercrombie gives an instance of an habitual hallucination, which at the same time was consistent with reason." In Kinne *v.* Kinne, 9 Conn. 102, the court held, that all which was necessary to testamentary capacity was an understanding of the nature of the business the testator was engaged in, a recollection of the property he meant to dispose of, and of the persons to whom he meant to convey it, and of the manner he meant to distribute it among them. And substantially the same rule was established in Comstock *v.* Hadlyme, 8 Conn. 265.

The court here say, that the same rule should be applied to the question of testamentary capacity, which is applied to that of responsibility for crime, in cases of partial insanity, namely, that although the prisoner may be laboring under partial insanity, if he still understands the nature and character of his act, and of its consequences, and has power to apply that knowledge, such partial insanity is not sufficient to exempt him from criminal responsibility. Commonwealth *v.* Rogers, 7 Met. 500; M'Naughten's case, in Ho. Lds. 47 Eng. C. L. Rep. 129, n. a. But in Pennsylvania it was held, that a less degree of mental imbecility is necessary to invalidate a will, than would be ground of acquittal from a criminal charge. McTaggart *v.* Thompson, 14 Penn. St. 149.

[31] McMasters *v.* Blair, 29 Penn. St. 298.

[32] Newhouse *v.* Godwin, 17 Barb. 236, following Stewart *v.* Lispenard, n. 13, n. 45.

tor was incompetent to make a valid contract, yet if he had the capacity to know his estate, the objects of his affections, and to whom he desired to leave his property, his will must stand.[33] Hence the general rule undoubtedly is, that a less degree of mind is requisite to execute a will understandingly than a contract,[34] but in some of the states it has been held, that the capacity requisite to make a valid will and a contract is precisely the same.[35]

13. This subject has lately received a most elaborate consideration in the New York Court of Appeals, where most of the cases bearing upon the subject were brought before the court and carefully considered. The following doctrines, some of which we * have before stated, are here quoted with approbation: — The testator must have reason and understanding sufficient to comprehend the act.[37] Lord *Kenyon*, in Greenwood *v.* Greenwood,[38] thus defines the rule: "He must have that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it. And in Harwood *v.* Baker,[39] *Erskine*, J., said: "He must have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property;" as well as that he is giving the whole of his property to one object of his regard.

14. In Den *v.* Johnson,[40] it is said, that a disposing mind and memory is one which has the capacity of recollecting, discussing, and feeling the relations, connections, and obligations of family and blood. In Shropshire *v.* Reno,[41] it was held, that to the validity of a will it was requisite that the testator's mind should be in a condition for disposing of his estate with reason, or according to some fixed judgment and settled purpose of his own. In Clarke *v.* Fisher,[42] Chancellor *Walworth* said, the testator, to be capable of

[33] Kirkwood *v.* Gordon, 7 Rich. (S. C.), 474; Terry *v.* Buffington, 11 Ga. 337.

[34] Converse *v.* Converse, 21 Vt. 168; ante § 9, n. 2.

[35] Coleman *v.* Robertson, 17 Alabama, 84.

[36] Delafield *v.* Parish, 25 New York, 9.

[37] Swinb. pt. 2, § 4; Marquis of Winchester's case, 6 Co. Rep. 23 a; Combe's Case, Moore, 759; Harlow *v.* Town, 1 Ch. 12, 14; Mountain *v.* Bennett, 1 Cox. 353.

[38] 3 Curteis, App. 2, 30.

[39] 3 Moore P. C. C. 282.

[40] 2 Southard, 454. See also, Boyd *v.* Eby, 8 Watts, 66.

[41] 5 J. J. Marshall, 91; Harper's Will, 4 Bibb, 244.

[42] 1 Paige, 171; s. c. 3 Sandf. 351; s. c. 2 Comst. Rep. 498.

making a testament, must be able to do it with sense and judgment in reference to the situation and amount of his property, and the relative claims of different persons, who are, or might be, the objects of his bounty.

15. And after reviewing the case of Stewart *v.* Lispenard,[43] the learned judge concludes his judgment upon this part of the case, in these words: "We have held that it is essential that * the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases,[44]

[43] 26 Wendell, 255.

[44] Converse *v.* Converse, 21 Vt. 168, from which the learned judge had extracted the same language in a former part of the opinion. Mr. Justice *Davies*, in his commentary upon the case of Stewart *v.* Lispenard, supra, says: "We fully concur in what is said by Mr. Justice *Clerke*, in Thompson *v.* Thompson, 21 Barb. 116, that 'the opinions of these learned and distinguished senators in this case are not binding authority.' Blanchard *v.* Nestle, 3 Denio, 37, affirmed the doctrine of Stewart *v.* Lispenard, mainly upon the authority of that case, that imbecility of mind, in a testator, however great, will not avail against his will, provided he be not an idiot or lunatic."

And after referring to two other cases, where the question had been considered by the Supreme Court, Stanton *v.* Heatherdox, 16 Barb. 259; Newburn *v.* Goodwin, 17 Barb. 206, in the latter of which cases, *Strong*, J., said of the decision in Stewart *v.* Lispenard: "We must submit to it, whatever may be our opinion as to its necessity, propriety, or expediency:" Says: "This court, in two late cases, under its consideration (Buel *v.* McGregor, and In the Matter of the Will of Richard Ustick), has not considered this rule as of obligatory force upon it, and has been disposed to give the language used in the statute its natural and obvious import and meaning." So that it would seem that the case of Stewart *v.* Lispenard is virtually overruled in New York. But it seems very questionable whether any different intelligible rule is defined, in Delafield *v.* Parish, as to the degree of mental capacity requisite to make a valid will, from that defined in Stewart *v.* Lispenard. It is said the testator must be compos mentis; and if he is not, that he cannot execute any will, even the simplest; and if he is compos mentis, he may execute any will, however complicated. But this rather serves to confuse the mind, by an apparent simplification, while in fact it only loads it down with a complication of terms affording no light. It is much easier to determine how far the testator comprehended the particular will, than whether he was generally compos mentis. And, with due submission, we must think that the former is the proper inquiry rather than the latter. The rule, as defined in Stewart *v.* Lispenard, is that no degree of mental weakness, short of actual idiocy, will necessarily incapacitate one for making a will. And that is all that is really determined by Delafield *v.* Parish, when it is required that it be made to appear that the testator was not non compos mentis, i. e., that he was not an actual idiot or lunatic, but possessed some sound, healthy, and sane mind and

have sufficient *active memory* to collect in his mind *without prompting*, the particulars or elements of the business to be transacted, and *to hold them in his mind* a sufficient length of time to perceive at least their obvious relations to each other, and be able to form *some rational judgment* in relation to them.

16. We have thus reviewed the more prominent cases, English and American, upon this important and controlling topic, the requisite testamentary capacity. And we cannot define the point with any more precision, or in any different terms from those already so often repeated; and which were adopted by Mr. Justice *Davies*, in the conclusion of his judgment, in the Parish Will case, upon this point. We say * this, not because we regard those words as conceived in any spirit of peculiar aptitude, or fitness, for their office, or because we regard the matter, as one free from serious doubts and difficulties; but because these terms have been so authoritatively indorsed, and because we find, the more we attempt to become precise, the more we become uncertain and obscure. Brevis esse laboro, obscurus fio.

17. We question whether the subject has ever been more fairly stated than by Swinburne:[45] "When he that is at the point of death," (or in a state of great mental imbecility) "and hardly able

memory. But all this determines nothing as to the particular case. It must appear, still further, that the testator understood what he was doing, when he made the particular will in question. Thus, in Beaubien *v.* Cicotte, 12 Mich. R. 459, it was said a will is not valid unless the testator not only intends, of his own free will, to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he is giving his property, and in what proportions, and whom he is depriving of it, as heirs or as devisees under the will he revokes. And in Mc'Clintock *v.* Curd, 32 Missouri, 411, it was held, that the proper question to be submitted to the jury is, "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged when he executed the will?" See, also, Parish *v.* Parish, 42 Barb. 274; Snow *v.* Benton, 28 Ill. R. 306.

In Parish *v.* Parish, supra S. C., or Delafield *v.* Parish, supra., the testator, an intelligent, educated, and retired merchant, made his will in 1842. In 1849, he was struck with apoplexy, followed with paralysis of the right side, and epilepsy, and remained in that condition until 1856, when he died. During that interval, three papers were executed, purporting to be codicils to his will. He could neither speak nor write, nor use a dictionary or blockletters, or letters in any way to signify his wishes. It was decided that he had not sufficient testamentary capacity to make a valid execution of such codicils, and that they were consequently of no force.

* [45] Swinb. pt. 2, sec. 25, pl. 5.

to speak so as to be understood, doth not of his own accord, make or declare his testament; but at the interrogation of some other, demanding of him whether he make this or that man his executor, and whether he give such a thing to such a person, answereth yea, or I do so, in which case it is a question of some difficulty, whether the testament be good or not. For if he, which doth ask the question of the testator, be a suspected person, or be importunate to have the testator to speak, or make request to his own commodity, as if he say, Do you make me your executor? Do you give this or that? and, therefore, the testator answer yea: It is to be presumed that the testator answered yea, rather to deliver himself of the importunity of the demandant, than upon devotion or intent to make his will." And this writer adds, that persons in such extremity, finding it painful to be disturbed, will give any answer to be quiet. And that some crafty persons take advantage of this painful extremity to obtain wills in their own favor. And that if such questions are put by suspected persons, the answer is not to be received as the free expression of the will of the testator. Swinburne here gives the case of a monk, who came to a gentleman then in extremis to make his will. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered yea. Then if he would give such and such *estates to such and such pious uses. The gentleman answered yea, to them all. The heir at law observing the covetousness of the monk, and that all the estate would be given from him, asked the testator if the "monk was not a very knave, who answered yea." And upon the trial "for the reasons above said, it was adjudged no will." But this writer says, if the person making such inquiries be sent for, as the friend of the testator, for the purpose of making the will, and have no interest in the matter, "the testament is good, albeit it were in prejudice of another testament made before."

18. All this, and much more said by the same writer, tends to bring the question to the very point to which, in the trial of numerous cases, more or less of this character, we have always felt compelled to bring the inquiry, in jury trials, that the jury ask themselves, after looking at all the testimony, and viewing the case in all its bearings: Whether the document, claimed to be the will of the testator, was really the product of his own free-will and action, or that of others; in short, whether they regarded it as the *will of the testator, or the act of some other person, or persons?*

19. It has been decided, that where a person gave directions for executing her will at eleven o'clock in the morning, and executed it at six in the evening, and died two hours after, that if at the time of giving the directions she had sufficient discretion for that purpose, and at the time of executing the will she was able to recollect the particulars which she had directed, she was to be regarded as of sound mind at the time of executing the will.[46]

20. The subject is very carefully considered in a recent case[47] *in Pennsylvania, both by court and counsel, with the following results. Though capacity to make a will may accompany a great degree of mental imbecility, yet in order to support a will so made, it must be shown that the testator, at the time of making the will, had an intelligent consciousness of the nature and effect of his act, a knowledge of the property he possessed, and an understanding of the disposition he intended to make of it. There is no practical distinction between the ability of the testator to make a will, and his capacity to understand it, and if the witness answers one question when asked the other, it is no ground of new trial.

21. The same rule obtains in the American states and in the ecclesiastical courts in regard to the disqualification resulting from interdiction. It is considered that such commission of lunacy, or letters of guardianship, prima facie, create a disability to make a last will and testament.[48] But this is by no means a universal rule. In a recent case[49] before the Prerogative Court of Canterbury, that

[46] Hathorn *v.* King, 8 Mass. 371. And this seems very reasonable.

[47] Daniel *v.* Daniel, 39 Penn. St. 191. We are gratified to find an able and experienced judge here placing the mark of his disapprobation upon refinements, and nice distinctions, in raising, and ruling, questions of evidence by counsel and court. They cost a great deal of labor and suffering, and are not only of no benefit, but sadly detrimental to the discovery of truth. *Woodward*, J., in Daniel *v.* Daniel, supra.

[48] Whitenack *v.* Stryker, 1 Green, Ch. 8.

[49] Bannatyne *v.* Bannatyne, 14 Eng. L. & Eq. 581. In M'Adam *v.* Walker, 1 Dow, 178, Lord Chancellor *Eldon* mentions a case, where he had been counsel, and the will was established, although the testator had been sometime insane, at its date, and was confined in a madhouse till the day of his death. But in this case, the will was sustained chiefly upon the ground of its innate reasonableness, and propriety, as it would seem from his lordship's report of the case; as it was expressed, upon the ground that the will, although voluminous and complicated, was "proper and natural;" proportioning the different provisions with the most prudent and proper care, with a due regard to what he had before done for the objects of his bounty, and in strict conformity with what he declared, before his malady, he intended to do. And in Clarke *v.* Lear, cited 1 Phillim. 119, an op-

eminent and learned judge, *Dr. Lushington*, examined the point with great care, and declared: "It must be admitted that from that verdict," [upon which the * commission issued] "a legal presumption arises against the validity of the will in question. But I am also of opinion that, in endeavoring to measure the strength of that presumption, I am bound to look at all the circumstances attending the inquisition, though not to the evidence given thereat." The effect of the inquisition may be made to operate retroactively, where the jury find the ward to have been of unsound mind, from a definite period anterior to the taking of the inquisition. This, at least, is the English rule upon the subject, as is obvious from the opinion of the learned judge just referred to.[50] In most of the American states, we apprehend, that such an inquisition, unless by special statutory enactment, could not be made to operate retroactively.

22. But even while a person is actually under a commission of lunacy, or guardianship, as we have said, it is no conclusive bar to his right to execute a will. And the presumptive disqualification may be explained, by showing that the inquisition was in fact ex parte, notwithstanding the formal notice to the party required by statute; that it was instituted and the inquiry had with altogether a different purpose in view, and that consequently no satisfactory opinion was, or could have been formed, in regard to the competence of the party for making a will; or that a favorable change has occurred in the party's state of mind, since the inquisition.[50]

23. But it seems to be settled in the English practice, that the testimony, taken at the inquisition, is not to be reviewed, for the purpose of showing its inconclusive effect upon the question of the party's testamentary capacity. In the last case cited,[50] the learned judge said, upon this point: "I disclaim emphatically all reference to the evidence before the jury. Legally speaking, I think I have no right to refer to these scraps of the evidence, which are brought out." — "I think I cannot refer to them as evidence, whether the testator was of sound mind, or * not." And in this the learned doctor is most unquestionably founded in the soundest principle. That evidence was given upon another trial, and on a different issue.

posite result was arrived at, upon the ground that the provisions of the will were unnatural and unreasonable.

[50] Dr. *Lushington*, in Bannatyne *v.* Bannatyne, supra.

CHAP. IV. PART II.

TESTIMONY TO ESTABLISH INSANITY AND LUCID INTERVALS.

1. Testimony, in all the departments of mental unsoundness, much the same.
   (1.) It is desirable to have the testimony of persons learned and experienced in the subject.
   (2.) It should come from persons familiar with the individual case.
2. From the necessity of most cases the testimony comes from a different class of witnesses.
3. We must inquire in regard to the mode of testifying of both classes.
   a. The first and chief doubt is whether unprofessional persons can give their opinions as to apparent sanity.
   b. On all subjects where knowledge requires training they cannot.
   c. There are many subjects where ordinary witnesses may state appearances.
4. The same rule applies in large measure to the subject of insanity.
5. Subscribing witnesses may always testify to apparent sanity or insanity.
6. The statute requires only credible witnesses, and they were to be witnesses of testator's sanity.
7. This affords presumptive evidence that only ordinary witnesses were required to that point.
8. This rule obtains in many of the American states.
9. In Pennsylvania, the witnesses testify to the very point of testamentary capacity.
10. In Tennessee and Georgia, substantially the same rule prevails.
11. The same rule obtains in Connecticut, Ohio, North Carolina, Vermont, Alabama, and Mississippi.

n. 6. The same rule has always obtained in the ecclesiastical courts.

n. 8. The mode of cross-examination allowed in such cases.

12. The question is placed on the true ground in Maryland, that appearances are facts.

n. 21. No particular period of previous acquaintance requisite to form an opinion.

13. This presents such an array of authority that any court would be justified in following it.
14. Upon the other hand, many of the states have rejected this kind of evidence.

* 15. The common-law courts in England, do not receive this kind of evidence.

16. All witnesses, in regard to mental capacity, should state the facts upon which they express an opinion.

n. 25. The distinction between the subscribing and other witnesses, as to giving opinions, without foundation.

17. Books of science or art not admissible, either before court or jury.
18. By the English rule professional experts may state the law of the profession as learned from books.
19. The difference between reading books of the law and other books of learning and science to court and jury.
20. Professional experts cannot be required to pass upon the very question before the triers.
21. The question should be presented to the mind of the expert in a hypothetical form.
22. Or it may be put with reference to the facts as stated by one or more witnesses where there is no conflict.

23. The rule as defined by Lord Brougham.
24. Lord Campbell's rule allows general and scientific evidence to be given.
25. The proper office of an expert is to instruct and educate the court and jury.
26. The points stated in detail as to which the expert may be interrogated.
27. May be inquired of as to the effect of the testimony, in detail, and required to give any instruction the court or jury may desire.
28. Upon principle, only men having charge of insane asylums are experts upon insanity.
n. 37. The subject further discussed and explained.
29. But the courts receive the testimony of all physicians as experts.
30. Experts who are acquainted with the person may give their opinions upon his sanity.
31. The jury, from all the testimony, are to decide the case as they deem proper, although it may be against that of the experts.
32. It is competent to prove insanity in any of the blood relations of the testator.
33. Experts may testify as to the state of mind indicated by the testimony.
34. Declarations of party interested may sometimes be received.
35, and n. 53. Where the party interested under a will is active in procuring it, the court should be watchful.
36. Statement of the grounds, and necessity for such watchfulness.

1. TESTIMONY to establish lucid intervals, or partial, or general insanity, must, from the nature of the case, be much of the same character. It must possess two characteristics, in addition to its truthfulness, the essential requisite in all testimony:

(1.) It should come from persons of general capacity, skill, and * experience, in regard to the whole subject, in all its bearings and relations:

(2.) It should come, as far as practicable, from those persons who have had extensive opportunity to observe the conduct, habits, and mental peculiarities, of the person whose capacity is brought in question, extending over a considerable period of time, and reaching back to a period anterior to the date of the malady.[1]

2. From the fact that it is not always possible to obtain the testimony of experienced and learned persons, in regard to the general subject of mental unsoundness, who have had opportunity of examining the particular case, or if so, of examining it before the controversy arose, and at all events, not for a sufficient length of

*[1] In Coglan *v.* Coglan, cited by Lord *Thurlow*, in Attorney-General *v.* Parnther, 3 Br. C. C. 444, the proof, in regard to lucid intervals, came from witnesses in the habit of watching the person, and this circumstance seems to have been regarded by his lordship, as of paramount importance, in determining the weight of the evidence. "Such persons can best prove whether the derangement had entirely ceased, or whether there was a perfect interval." In Hall *v.* Warren, 9 Vesey, 611, the testimony of the servant is relied upon as important.

time before, to be able to give a reliable opinion upon their own knowledge of the facts, the necessity has arisen of deriving the facts from unprofessional witnesses, and then allowing them to be examined and discussed before the jury, by a class of men called experts, who have had special opportunities, by study and observation, to imbue their own minds with such knowledge, as peculiarly fits them to give instruction to others upon the particular questions involved.

3. It will, therefore, be important to inquire in regard to the form and manner of giving testimony by both these classes of persons.

a. In regard to the proper course of inquiry of unprofessional witnesses. The only doubt or difficulty here is in regard to the point, how far such persons can properly be allowed to give an * opinion in reference to the apparent sanity or insanity of the person, whose state is the subject of inquiry. There is so much conflict in the decisions upon this point, that it seems desirable to look at it briefly with regard to the principles involved, and the nearest analogies bearing upon it. There are, no doubt, many questions, depending upon inference and judgment, where unprofessional witnesses are allowed to express an opinion.

b. The distinction usually taken upon this point is, that if the question to be determined depends upon principles requiring a previous course of training, in order to their solution, the testimony must come from such persons, as have had such previous training. Thus, questions of science and art can only be solved by the opinion of such persons as have had experience and study in the particular department.

c. There are many questions where ordinary witnesses may state their opinions, as in regard to the value of property, the solvency and responsibility of persons, and some others, where knowledge is either difficult or impossible. And there are other questions in regard to the existence of disease, the state of the affections, where the causes are latent, and only exhibiting themselves by certain external indicia, or signs, where the exhibition of such external signs constitute facts, which it is important for the jury to know, and which are commonly incapable of proof except by unprofessional witnesses; they are therefore allowed to testify to such appearances, or symptoms. These involve opinion, but are nevertheless facts, which it is impossible to express, except in a way to

indicate the opinion of the witness, that such appearances sprung from the existence of latent causes, in existence and operation. As, for instance, whether a person was sick or in health at a particular time, or was feigning sickness, where it is obvious science, special training, and experience, could afford some aid, in determining such a question, but where ordinary witnesses may state the appearance.[2] And * the same rule applies to many other subjects.[3] It has been extended to questions in regard to the state of the affections, as in cases of breach of promise of marriage.[4] And the same rule, upon this point, obtains in the English courts.[5]

4. A similar rule applies with much the same force to the matter of insanity, which, although it is capable of description, to some extent, is not in the same sense, and to the same extent, as are simple facts. Sanity and insanity are such complex states, and the symptoms so latent, that it is often impossible to describe them in any intelligible manner, except by stating appearances, which persons of common observation and experience are nearly as capable of noting with accuracy, as many medical men, who have not had special opportunities of observation upon this particular subject.

* [2] Spear *v.* Richardson, 34 N. H. 428. This was held to be an exception to the general rule, that the witness must state facts, because sickness and health * are things incapable of description. And it was impossible for the witness to communicate his knowledge to the jury, in any other mode, than to say, after giving such facts as were capable of description, that the person appeared to be in health, or that he did not. See also, to the same point, Milton *v.* Rowland, 11 Ala. 732; Lush *v.* M'Daniel, 13 Ired. 485, contra.

[3] Best, Pr. of Ev. § 499; Fryer *v.* Gathercole, 13 Jur. 542. Opinions of witnesses upon this principle are received upon questions of identity of persons and property, and of handwriting. Best, Pr. Ev. §§ 493–499.

[4] M'Kee *v.* Nelson, 4 Cow. 355.

[5] Trelawny *v.* Colman, 2. Stark, 191, where it was held, that the opinions of witnesses were properly receivable, to show the affection of the wife toward the husband, in an action for criminal conversation. It is evident that, in these cases, the witness really testifies to such *appearances* as he himself observed, and the opinion is nothing more than that these appearances were genuine, and proceeded from a latent cause, in existence and operation.

* It is accordingly held in the ecclesiastical courts, and in many of the American states, that this kind of evidence is admissible upon the trial of questions of sanity. Wheeler *v.* Alderson, 3 Hagg. 574; Wright *v.* Tatham, 5 Cl. & Fin. 692, where the subject is learnedly discussed, and the point conceded, that such a rule obtains in the ecclesiastical courts, although it is not recognized in the courts of common law in England. The principal ground of distinction claimed to exist in the two courts, is the want of jury trials in the ecclesiastical * courts. See also, as

* 5. It is admitted, in nearly all the cases, that the subscribing witnesses to the will are competent to express an opinion of the testator's apparent sanity at the time of execution. Some who have argued against the admission of all unprofessional witnesses to do the same, have placed the distinction upon the ground, that the testator has chosen these witnesses; but it seems to us a much better reason may be found, in the fact that the statute only requires credible, or competent, witnesses, and that it is not competent for courts to require more than the statute, or to say, that when the statute defines the requisites of a witness, he is not to be regarded as competent to testify to every point directly involved in the issue, whether the paper presented for probate be the will of the alleged testator, or not.

6. And as the inquiry in regard to testamentary capacity finally centres in the moment of execution, it would be strange if the law required the testimony of professional experts to that point, the statute should have been wholly silent upon the question, or, by implication, should have ignored it.

7. This affords, we think, very strong presumptive evidence, that the legislature could not have contemplated the requirement of professional experts to the capacity of the testator, either in the primary witnesses, which it required to subscribe the attestation of the will, in the presence of the testator, or in the secondary, or rebutting proof, which it must have been within the contemplation of the statute, would be adduced in support and confirmation of the primary witnesses, in every case where the validity of the will should be contested upon the ground of want of testamentary capacity at the time of the act.

8. Accordingly, we find this rule in operation in many of the American states, with the reasonable and necessary qualification, * that the witness must state the facts upon which such opinion is founded.

9. In Pennsylvania,[7] this rule seems to have obtained, from an early day. In this case it was held, that witnesses, familiar with the testator for a long period during the latter part of his life, after stating the changes which had taken place in his mental condition,

to this rule obtaining in the ecclesiastical courts, White *v.* Driver, 1 Phillim. 84; Kinleside *v.* Harrison, 2 Phillim. 449; Dew *v.* Clark, 3 Add. 79; Cartwright *v.* Cartwright, 1 Phillim. 90.

* [7] Rambler *v.* Tryon, 7 Serg. & R. 90.

might also declare their opinions, founded upon these facts, that the testator, from defect of understanding, was incapable of making a will.[8] The same point, in the same form, was decided in a later case.[9] In a still more recent case,[10] in this state, it was decided, that a witness, after testifying to facts within his own observation, affecting the grantor's state of mind and capacity, might be asked whether, from his general appearance, he considered him capable of making a contract, or transacting important business? But the jury are to judge of the correctness of the opinion from the facts disclosed. In Connecticut, it has been an established rule for many years, to allow unprofessional witnesses, acquainted with the person whose sanity is in question, to detail the facts indicating want of mental capacity, or derangement and disorder of mind, and then to give their opinions, founded upon such facts and accompanying observations.[11] The same rule obtains in Indiana.[12]

* 10. In Tennessee, it is held, that only the witnesses to a will can be permitted to give an opinion of the testator's state of mind, without assigning any reason therefor.[13] It is here said, that physicians may state their opinions, but must also state the symptoms and circumstances from which they draw that conclusion. And

[8] The form of the question seems objectionable. The witness should not, we think, whether professional or not, be allowed to pass directly upon the point of inquiry before the jury. But we shall recur to this point again.

[9] Wogan *v.* Small, 11 Serg. & R. 141.

[10] Wilkinson *v.* Pearson, 23 Penn. St. (11 Harris) 147.

[11] Grant *v.* Thompson, 4 Conn. 203; Kinne *v.* Kinne, 9 id. 102. In the late case of Dunham's Appeal, 27 Conn. 192, it was decided, that unprofessional witnesses, after having expressed their opinion in regard to the sanity of the testator, based upon facts detailed by them, and within their own observation, could not be required, upon cross-examination, to answer an interrogatory propounded in the form of a hypothetical case, as to whether the facts stated tended to show sanity, or not. The point is stated in the marginal note, as if the court held that the witness could not be *permitted* to answer the question, whereas the decision was, that he could not be *required* to answer such a question, because it was an ensnaring one, and in regard to a subject upon which the witness professed no special knowledge or skill, and was wholly without the range of legitimate inquiry, and was therefore one which the witness may always decline to answer, as he may any other question, not relative to the case, whether upon direct or cross-examination. And the same was held in Rambler *v.* Tryon, 7 S. & R. 95.

[12] Doe *v.* Reagan, 5 Blackf. 217.

[13] Gibson *v.* Gibson, 9 Yerger, 329. The same rule seems to prevail in New Jersey. Vanauken's case, 2 Stock. Ch. 186, 192; so also in Missouri, Farrell's Admr. *v.* Brennan's Admr. 32 Mo. R. 328.

that the opinions of other witnesses than either of the above classes, merely as such, are not evidence, but having stated the appearance, conduct, conversation, or other particular facts, from which the state of the testator's mind may be inferred, they are at liberty to state their inference, conclusion, or opinion, as to the result of these facts. And the same points, except as to the testimony of medical witnesses, have been decided in Georgia.[14] But in regard to the latter class of witnesses, it is here held, that they may be allowed to express an opinion directly upon the point of the sanity of the testator, whether founded upon facts within their own observation, or testified by others.

11. The same general view is taken in regard to the propriety of receiving the testimony of unprofessional witnesses, by way of opinion, upon the facts related by them, in connection with their observations from knowledge and acquaintance with the testator, in regard to his apparent sanity and capacity,* in Ohio,[15] and North Carolina.[16] The same rule obtains also in Vermont, and has from

[14] Potts *v.* House, 6 Ga. 324.

* [15] Clark *v.* The State, 12 Ohio, 483. In the late case of Runyan *v.* Price, 15 Ohio, N. S. 1, it is said the opinion of a witness, as to the sanity of the testator, must relate to the time of his examination; and he cannot be asked, upon the direct examination, his opinion at a former time. And the witness cannot be asked his opinion as to the competency of the testator to make a will; that inquiry involving matter of law, as well as fact, and being the very point upon which the verdict is to turn. Ib.

But in Braubien *v.* Cicotte, 12 Miss. 459, it was held, there is nothing in the nature of inquiries concerning mental capacity which requires juries to be informed, of necessity, by other than ordinary witnesses. Therefore in an inquiry concerning mental capacity to perform a certain act, witnesses who are not experts may testify to their opinions upon the question in controversy, based upon their own observations. It is proper to put the question to the witness in such a way as to call for his opinion upon capacity with reference, as near as may be, to the very act or kind of act in dispute. Accordingly, on a question of capacity to execute a will, it was held proper to ask a witness who had seen and conversed with the testator near the time of executing the instrument, whether, from the conversation then had with him and from what he then saw of him, he was capable of comprehending or understanding a document of any considerable length, if it had been read to him. Also what capacity the testator had, at the time the witness saw him, to understand business-matters. Also whether, in the opinion of the witness, the testator was, at the time, capable of holding a conversation, like one testified by another witness to have taken place.

[16] Clary *v.* Clary, 2 Ired. Law Rep. 78. In this latter case, the learned judge shows, with great ability and abundant success, in our judgment, that the rule here adopted is the only one consistent with principle, or comprehensive enough

a very early day,[17] and, as we infer, in Alabama,[18] where it is held, that opinions as to the capacity of the testator, are not admissible on a question of his sanity, until the facts upon which they are based are given, and can be given, only by those whose long and familiar acquaintance with the deceased qualifies them peculiarly to detect any mental aberration in him. And the same rule obtains in Missouri;[19] where it was held, that, on a plea of insanity, it is competent for a witness, who is not an expert, to give his testimony, by way of opinion, as to the state of the prisoner's mind * before and at the time of the act; but the facts upon which such opinion is based must be stated.

12. It has always seemed to us, that this question is placed upon its true ground in Maryland,[20] where it is held, that mere naked opinions of other persons than the subscribing witnesses to a will and medical experts, are inadmissible in regard to the sanity of the testator; but the impression made upon the mind of a witness, by the conduct, manner, bearing, conversation, appearance, and acts of a testator in various business transactions, is not mere opinion; it is knowledge, and strictly analogous to the cases of personal identity and handwriting. See also, the high authority of the United States Court in New Jersey.[21]

to embrace the rationale of all the decisions upon this question, which are of gen erally acknowledged authority.

[17] Lester *v.* Pittsford, 7 Vt. 158; Morse *v.* Crawford, 17 Vt. 499. Cram *v.* Cram, 33 Vt. R. 15.

[18] Roberts *v.* Trawick, 13 Ala. 68.

[19] Baldwin *v.* The State, 12 Mo. 223.

[20] Townshend *v.* Townshend, 7 Gill, 10; Dorsey *v.* Warfield, 7 Md. 67. And in a late case, Weems *v.* Weems, 19 Md. 334, it was decided, that the mere naked opinions of persons not occupying the position of professed medical attendants, as to testamentary capacity, are not admissible. But where the witness was a brother of the testator, engaged with him in business, and the intimacy had continued through the life of the latter, with the consequent opportunity of judging of the state of the testator's mind, and of the change in its condition, it was urged that it can scarcely be said that his opinion, being the result of actual knowledge, was not admissible.

We perceive no sufficient reason why the mere opinion of such a witness is admissible more than that of any other unprofessional witness. It is only in degree that his position differs from theirs. We think he should be required to state the facts observed by him as the foundation of his opinion, or else it is not admissible.

[21] Harrison *v.* Rowan, 3 Wash. C. C. 580. It is clear that unprofessional witnesses can give evidence only of facts and appearances within their own observation, and that when they are allowed to express an opinion of the mental soundness of any person, it must be based upon facts and appearances within their own

* 13. This presents a considerable array of authority, sufficient, we think, to warrant any court in deciding the question in that direction, unless it regards the true principle applicable to the case, as lying in the opposite direction.

14. Upon the other hand, there are a number of the states which hold this class of testimony as inadmissible. It is so held in New York, by a divided court,[22] and in Massachusetts, by an evident departure from what has been elsewhere regarded as the real point decided by the early cases in that state.[23]

* 15. The same rule obtains in the courts of common law in England, as we have already stated.[24]

16. There seems to be no question, that the subscribing witnesses to a will may be asked the general question, how the testator appeared in regard to soundness of mind, at the time of executing his will.[25] But in some of the states, even the subscribing wit-

personal knowledge and observation. But it has been held, that no precise time or character of previous acquaintance can be laid down as a fixed rule. It depends upon the kind and degree of the mental affection. Powell *v.* The State, 25 Ala. 21; Norris *v.* State, 16 id. 776.

In a late case in Pennsylvania, Eckert *v.* Flowry, 43 Penn. St. 46, it was decided, that conversations held with the testatrix some time after the execution of the will, do not qualify a witness to give an opinion as to her capacity to make a will, nor is evidence admissible that the executor, against whom fraud and undue influence in procuring the will was charged, he being plaintiff in the suit, had forbidden the witness to go and see the testator, a long time after the execution of the will.

[22] Dewitt *v.* Barley, 5 Selden, 371, which is decided by five judges against three, and reverses the decision of the supreme court in the same case at general term. 13 Barb. 550, 580

[23] Commonwealth *v.* Wilson, 1 Gray, 339. In Poole *v.* Richardson, 3 Mass. 330, it is said: "Other witnesses were allowed to testify to the appearance of the testator, and to any particular facts, from which the state of his mind might be inferred, but not to testify merely their opinion or judgment." Other cases in Massachusetts adopt similar views. Buckminster *v.* Perry, 4 Mass. 593; Dickinson *v.* Barber, 9 Mass. 225; Needham *v.* Ide, 5 Pick. 510. See also, Gehrke *v.* The State, 13 Texas, 568, where it was held, that unprofessional witnesses could not be allowed to testify to the appearance of the person, whose sanity was in question, being similar to that of others, whom [illegible] had observed, and who were confessedly insane, nor that the person looked and [illegible] like one insane. But the New York cases, until the late decision in the Co[illegible]ppeals, seemed to point in the opposite direction. Culver *v.* Haslam, 7 [illegible]; Clark *v.* Sawyer, 3 Sandf. Ch. 351. The People *v.* Rector, 19 Wend

[24] See ante, n. 6.

[25] Needham *v.* Ide, 5 Pick. 510; Gibson *v.* Gibson, [illegible], Townshend

nesses are to state the conduct and appearance * of the testator, in connection with the opinion they give in regard to his mental condition.[26] But we cannot conceive, that the testimony of any witness upon this point could gain much credit, or have much influence upon the mind of the jury, except in connection with the facts, disclosing his conduct and appearance at the time, and we understand this is the general, not to say universal, practice in all courts, even in regard to professional experts, who have the opportunity of personal observation.

17. It is important to have definite views of the character and extent of evidence coming from medical experts, and the form in which it may be received. A preliminary question is made by some writers, in regard to allowing general treatises upon scientific

v. Townshend, 7 Gill, 10. It may not be out of place here, to suggest, that the distinction in regard to allowing the subscribing witnesses to the will, a peculiar privilege in giving their opinion in relation to the sanity of the testator at the time of its execution, and denying that privilege to others, is, practically, wholly groundless, and an absurd one in itself. For in nine cases out of ten, at the present day, certainly, they are not selected by the testator, or from the number of his intimate friends and acquaintances; but more commonly are called by the scrivener, or solicitor, because they happen to be most convenient. And where such, is the fact, it cannot be regarded as any thing less than an inconsistency, to allow such casual comer, who may never have met the testator in his life before, to express an opinion, whether based upon facts and appearances stated by him or not in regard to the sanity of the testator, and his general testamentary capacity; and at the same time to reject similar evidence coming from his life-long, intimate, and familiar friends, and acquaintances, whose single narratives would often prove more satisfactory to the mind of the court and jury, than all the other testimony attainable, whether coming from the subscribing witnesses or from professional experts. It is some consolation to reflect, that where the refinements of the law attempt to enforce any such rules, not based upon reason, or principle, or the common experience of mankind, it is usually found impracticable, in its application to the detail of a trial. For how much soever courts, jurors, and counsel, may labor to obtain the testimony of one long and familiarly acquainted with the life and history of the testator, without allowing the opinion of the witness in regard to the state and condition of the testator's mind to transpire, it will be found never to succeed. It is impossible for any such witness to give his testimony, in regard to facts affecting the state of mind of the testator, without incidentally intimating, with sufficient distinctness, how his own mind has been affected by these facts, as they were passing. In Logan *v.* M'Ginnis, 12 Penn. St. 27, it is held, that subscribing witnesses may state their opinion without having previously stated the facts upon which it is based.

* [26] Cilley *v.* Cilley, 34 Me. 162. The inquiry as to sanity, extends over a considerable space of time, both before and after the fact. Jerry *v.* Townshend, 9 Md. 145.

and professional subjects, to be read before the jury. This has been allowed by many courts, either as part of the testimony, or of the argument of counsel. But when objected to, they have not generally been allowed to be read, either to court or jury.[27]

18. The rule in England, seems to be settled in the same way.[28] In the latter case, *Tindal*, Ch. J., said, " Physic depends * more on practice than law. I think you may ask the witness, whether in the course of his reading he has found this rule laid down." — " I do not think the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford his judgment and the grounds of it, which may be in some degree founded on books as part of his general knowledge." This rule seems now to have obtained general currency, both in this country and in England.[29]

19. If there is any good reason why, when we are looking after a rule of law in the medical profession, we may not resort to the same mode of proof which we admit, in proof of the rules of municipal law, it must be found in the fact that the proof is not ad-

[27] Commonwealth *v.* Wilson, 1 Gray, 337; Washburn *v.* Cuddihy, 8 Gray, 430; Ashworth *v.* Kittridge, 12 Cush. 193. Such books were allowed to be read in Bowman *v.* Woods, 1 Iowa, 441.

[28] Cocks *v.* Purday, 2 Car. & K. 270; Collier *v.* Simpson, 5 Car. & P. 74. In some English cases, medical books have been read without objection. Reg. *v.* Oxford, 9 Car. & P. 525; M'Naughten's case, 1 Townshend, St. Trials, 357, 358; Roger's Trial, 48, 76, 79, 80. The American cases follow the lead of the English cases. Melvin *v.* Easley, 1 Jones, Law, 386; Lunning *v.* The State, 1 Chandler (Wis.), 264, where it was held to be a matter in the discretion of the court. And in State *v.* Terrell, 12 Rich. Law Rep. 321, it was held, that experts, in giving their opinions, were not confined to the results of their own observation and experience, but may give opinions based upon information derived from books. So an expert may refer to other cases, in his own experience, as * illustrative of the case before the court. Parker *v.* Johnson, 25 Ga. 576. But he cannot give his opinion upon the opinions previously given by other experts. Walker *v.* Fields, 28 Ga. 237. Books not allowed to be read in Indiana. Carter *v.* State, 2 Carter 617.

There is a valuable paper upon this subject in the late edition of Beck, Med. Jur. 948 (1863), where the remonstrances of the profession are given against the exclusion of medical books, as if it tended to throw disrespect upon the learning of the profession, which the reason formerly assigned for their exclusion seemed to imply, namely, that they could not be received as evidence in the cause, because the authors were not sworn! But when the true ground of exclusion is considered, that the court are not so far instructed upon the subject as to be able to understand and apply them properly, the disrespect, if any, falls upon the legal profession.

[29] 2 Beck, Med. Jur. 972; Elwell on Med. Ev. 331.

dressed to a tribunal supposed to be experienced in that law. If we were attempting to prove the law of the medical profession upon any given point, before a committee of learned doctors of medicine, we suppose no one could question the propriety of reading approved treatises. But the same has been held not to apply, where the evidence is adduced before a tribunal wholly inexperienced in the principles involved in, or the credit due to, the authorities offered.

20. It has been made a serious question in the English * courts, in what particular form witnesses, called as experts, shall be interrogated upon the subjects in regard to which they are called to testify. In the case of King *v.* Higginson,[30] which was a conviction for murder, the question of the form of the inquiry was submitted to all the judges in Westminster Hall, who returned for answer, that the witness cannot be asked his opinion upon all the evidence in the case, where he has been present during the whole trial: Whether the prisoner was conscious of doing wrong in the commission of the act, and whether he was at the time laboring under delusion? because this form of putting the inquiry, calls upon the witness to pass upon the truth of the testimony. And where the testimony is conflicting, it will not appear, in this general form of putting the inquiry, what portion of the testimony the witness assumes as true. And even where there is no conflict in the evidence, it was said by the judges, that this general form of putting the inquiry, could not be insisted upon, if objected to. A similar rule has been adopted in some of the American states.[31]

* [30] 1 Car. & K. 129.

[31] Woodbury *v.* Obear, 7 Gray, 467, 471. But in Negro Jerry *v.* Townshend, 9 Md. 145, it is said, a medical man who has been present during the whole trial, may be asked what his opinion would be, upon the hypothesis that all the testimony is true. In the case of The State *v.* Windsor, 5 Harring. 512, the court held the following a proper question to be put to a medical expert: You have heard all the evidence in the case, suppose the jury are satisfied of its truth, what is your opinion of the state of the prisoner's mind, at the time of the commission of the alleged crime? Was the prisoner, at the time of doing the act, under any, and what kind of insanity or delusion, and what would you expect would be the conduct of a person under such circumstances? But in The People *v.* M'Cann, 3 Parker's Cr. Rep. (N. Y.), 272, it was held not to be a proper inquiry to a medical expert present during the trial, what was his opinion, upon the facts stated, in regard to the sanity of the prisoner on the night of the homicide, but the witness was allowed to give his opinion upon the hypothetical case embracing the same facts, and that the minutes of testimony might be read to the witness, and his opinion asked, supposing that state of facts having existed. And a medical expert

* 21. In this last case the court says, the question should be thus propounded: "If certain facts assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion, upon the facts thus found true, on the question of soundness of mind." In the case of the King *v.* Higginson, Mr. Justice *Maule*, who dissented from the other judges, shows very conclusively, that in England, until a very recent period, the general form of inquiry of professional witnesses, whether the person was, or not, of sound mind, had always been allowed, and that it was far the most natural and convenient mode of conducting the inquiry. Of this we think there can be no question, and that all the modern refinements upon the form of putting the inquiry to experts, has been attended with no practical results. But it is important that the course of practice should be, as nearly as possible, uniform, and that it should be reasonable, and attended with good practical results.

22. In an important case,[32] *Shaw*, Ch. J., declares the form of inquiry to be, assuming the jury find the facts as testified by a certain witness, or by all the witnesses, when there is no conflict in the testimony, whether in the opinion of the witness the prisoner was insane; and what was the nature and character of the insanity indicated, if any; what state of mind such facts indicated; and what the witness would expect would be the conduct of such a person, under any given circumstances? Mr. Justice *Curtis*, adopted a similar rule in regard to the mode of putting the inquiry in such cases, in a case in the Circuit Court of the United States.[33] The most convenient mode of putting the inquiry, and the least exceptionable one, in our judgment, is to inquire what state of mind is indicated by certain facts, assumed, or testified by certain witnesses, or in any other hypothetical form of bringing the point of inquiry to the mind of the * witness. If the witness says the facts assumed indicate mental unsoundness, he may be inquired of in regard to the state and degree of mental unsoundness thus indicated, and how far it will disqualify the person for business, or render him unconscious of the nature of his conduct. He should also be inquired of, whether these facts are explainable in any other mode except upon

may express his opinion upon certain facts detailed by other witnesses, or upon his personal observation. M'Allister *v.* The State, 17 Alabama, 434.

[32] Commonwealth *v.* Rogers, 7 Met. 500.

[33] United states *v.* McGlue, 1 Curtis, C. C. 1.

the theory of insanity, and with what degree of certainty they indicate the inference drawn by the witness.[34]

23. In McNaghten's Case,[35] Lord *Brougham* said, in regard * to the proper mode of interrogating the experts: "You shall ask them if such a fact is an indication of insanity, or not — you shall ask them upon their experience, what is an indication of insanity — you shall draw from them what amount of symptoms constitute insanity."

24. Lord *Campbell* said, "the witness may give general scientific evidence, on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard, with reference to the sanity or insanity of the prisoner."

25. The proper office of experts is to instruct the court and jury, in the laws of a particular science or subject, in order to enable them to judge of the force and application of the testimony, in the

* [34] In Sills *v.* Brown, 9 Car. & P. 601, which was a case of collision at sea, nautical men were examined as experts, and were required to state what was the duty of the captain under certain assumed states of fact, which coincided with the theory of the different sides. And in Jameson *v.* Drinkald, 12 Moore, 148, Mr. Justice *Parke* said: That in such cases nautical men may be asked to what cause they think the accident attributable, but they must not state upon which side they consider the fault to be, this being the exclusive province of the jury. It seems to us this is being deluded by a pretty thin disguise, but after all there may be something in the distinction more than is obvious to mere common sense. A plain man would think, if the witness told, to what the accident was attributable, this must inform the jury, which party in his opinion was in fault.

[35] 10 Cl. & F. 210. This point is discussed by Dr. Ray, in the last edition of his valuable work, pp. 572 et seq., with great thoroughness and ability, and in a far more practical manner than is common with the legal profession. But we think he gives more weight to the judicial refinements upon the question, than they are fairly entitled to have. He shows very fully, what every one, at all conversant with trials, has had occasion often to observe, that the hypothetical mode of putting scientific inquiries to the experts, does not essentially differ from the straightforward, common sense mode of putting the question. And we think this should satisfy every one that the only importance in the matter is to have reasonable uniformity in practice.

In the early case of Earl Ferrers, 19 Howell, 943, The Earl of *Hardwicke* said: "The question must be asked whether this or that is a symptom of lunacy." In Reg. *v.* Frances, 4 Cox, C. C. 57. Baron *Alderson* said: "The proper mode is to ask, 'what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity." But in both these cases the witnesses were not allowed to answer the direct question, whether * the prisoner was insane, since that was the only question to be submitted to the jury. And the same rule was adopted by Lord *Campbell*, in Doe d. *v.* Bainbrigge, 4 Cox, C. C. 451.

same understanding mode in which they would be able to do, if they had been before properly instructed upon the subjects involved. It is, so to speak, to educate the court and jury by a kind of short-hand process, in a particular department of science or art.

26. The witness may, therefore, no doubt be asked, in detail, his opinion upon each particular of the testimony given, and whether it indicates mental unsoundness, and whether it is explainable upon any other theory, and if so, what is the degree of probability that it results from the one cause or the other. He may also be asked, whether, if all the facts deposed do exist, it would be consistent with the theory and history of insanity, to call the man sane, or insane, as the case may be. And he may also be inquired of in regard to the particular species of insanity, which is indicated by the testimony, and as to the history and development of that species of insanity, and the degree of mental incapacity indicated by the symptoms testified to. In short, every question, tending to test the character and accuracy * of the opinion of the expert, upon all the symptoms disclosed in the evidence, and which ought to have been, or might have been, expected to have been disclosed, by the alleged form of insanity, if it really existed.

27. So that the testimony of a medical expert, upon the question of insanity, and the rule must be the same in other cases, may be taken in regard to all the facts disclosed by the testimony, where the witness has attended during the whole trial, by referring him to the testimony, either in gross, or in detail, as coming from particular witnesses; and when he has not attended the trial, by repeating such facts to the witness (as a hypothetical case), as his opinion may be desired upon. There seems to be no restriction upon this course, even in the English practice, and it seems to us the more lucid, and the fairer course of examination, in regard to the subject. You may also, according to both the English and American practice, require of the experts any extent of instruction, in regard to the general subject of insanity, or other subject before the court, or the particular form of the disease under investigation, which the leisure of the court and jury will allow them to wait for. In this way it is supposed the jury will be enabled to possess themselves of all the important matter contained in the approved treatises upon the question under consideration. This question is very thoroughly and learnedly discussed in a late case in Vermont;[36] and

[36] Fairchild *v.* Bascomb, 35 Vt. R. 398.

the formula of Chief Justice *Ruffin*, in an early case,[37] in North Carolina, adopted as the most satisfactory, holding that the question to the experts, and to all witnesses competent to express an opinion, should be so framed as to require them to state the degree of the testator's intelligence or imbecility, in their own language, and by such ordinary terms and forms of expression as will best convey their own idea of the matter; or, in other words, "in the best way they can."

28. The question has sometimes been made, how far ordinary physicians are to be regarded as experts upon the general subject of insanity, since that malady has become strictly a specialty, in regard to treatment, throughout the country; where any distinction is attempted to be maintained between the mode of giving testimony by experts and other witnesses; as there is everywhere, in regard to expressing an opinion in relation to the facts contained in the testimony of other witnesses, or embraced in the general range of the subject; it seems very questionable how far all the medical profession can properly be regarded as experts upon this subject. If the capacity to give testimony as an expert, depends upon the practical experience of the witness, *as the term seems to imply, and the declaration of *Tindal*, Ch. J.,[38] certainly requires, then it cannot be said that ordinary physicians have much qualification to give testimony as experts in regard to insanity.[39]

[37] Crowell *v.* Kirk, 3 Dev. Law, 355.

[38] Ante, pl. 18.

[39] Baxter *v.* Abbott, 7 Gray, 71; 1 Greenl. Ev. § 440, n. 2. "Experts," says this writer, "in the strict sense of the word, are persons instructed by experience. 1 Bouv. Law Dict. in verb. But, more generally speaking, the term includes all men of science, as it was used by Lord *Mansfield* in Folkes *v.* Chadd, 3 Doug. 157." This is the earliest reported case upon the subject of receiving the opinion of learned men upon questions of art or science. The question was in regard to the effect of a sea-wall, in choking up Wells' harbor, by stopping the back water. It was held, that the opinion of scientific men, as to the effect of such an embankment upon the harbor, was admissible (the witness being acquainted with the construction of harbors, and the causes of their destruction, the course of tides and winds, and the shifting of sands, and how such impediments are to be remedied), such opinion being formed as matter of science, skill, and experience, was competent to be received, as an aid to the court and jury, in coming to a correct conclusion. This question is ably discussed in a late case in Vermont, Fairchild *v.* Bascomb, 35 Vt. R. 398. But some of the suggestions there made seem hardly maintainable, under the present rules of practice. Mr. Justice *Aldis* here says, it seems that physicians in general practice, and nurses accustomed to attend the sick, are *experts* in regard to the mental capacity of sick persons. We are not aware that

29. But the courts do not yet seem prepared to make any discrimination between the different members of the medical profession in regard to giving testimony, as experts, upon the subject of insanity. It was accordingly held, that any practising physician is competent to express an opinion, as an expert, on a medical question.[40] And the question seems to have been distinctly passed upon in a recent case in Massachusetts.[39] *Thomas*, J., here said, "We think the settled practice in this Commonwealth has been, to admit the opinion of educated, practising physicians, upon subjects of medical science." . . . And after adverting to the fact that some of the departments of the profession had become specialties, the learned judge adds: "But this fact does not render incompetent upon this subject the testimony of other physicians, who must necessarily have less experience. * The difference is in the weight of testimony rather than the competency of the testimony." [41]

30. It has been decided often, that medical experts may express a direct opinion upon the sanity of the testator, where they have had opportunity to form such opinion from personal examination or acquaintance.[42] But he is not to combine his own observation upon

professional nurses are regarded as experts, unless they have devoted time and study to the acquisition of more than ordinary scientific knowledge upon that subject. And, practically, it would be opening a door to the admission of half the women in the country, who have reached middle life. It is here suggested by the learned judge, that an educated physician and surgeon, who, for more than thirty years preceding, had devoted himself almost exclusively to the treatment of persons, suffering from mental maladies, and who, for the last twenty-five years, had been superintendent of an insane asylum, would not be competent to testify, as an expert, in regard to the state of mind, and testamentary capacity, of one who had never been insane, but was suffering from decline, and enfeebled physical condition, near the time of death. We should have supposed that the study and experience of such a man, instead of disqualifying, would rather have tended to render him more competent, to give evidence upon such a question.

[40] Livingston *v.* Commonwealth, 14 Grattan, 592; Best on Evid. § 496; Mendum *v.* Commonwealth, 6 Rand. 704; Tullis *v.* Kidd, 12 Ala. 650; Washington *v.* Cole, 6 Ala. 212.

[41] It seems to be implied from this statement of the rule, that the witness must be, or have been, a practising physician, which is certainly a reasonable requirement. But we believe that even this rule has not always been observed. Those who have been educated to the profession, although long retired from practice, and sometimes, even, without having ever had much regular practice, if prepared to offer themselves as experts, have always been received, so far as we know.

[42] Baxter *v.* Abbott, 7 Gray, 71; Commonwealth *v.* Rogers, 7 Met. 500; McAllister *v.* State, 17 Ala. 434; Clark *v.* State, 12 Ohio, 483.

the symptoms and appearance of the testator or other person whose sanity is in question, with representations made to him by others, such as nurses and other physicians,[43] in regular attendance upon the person. But some of the cases deny an expert, who has had opportunity to examine the person, the right to express a direct opinion upon the point of insanity,[44] or capacity to execute a will,[44] that being the very question to be determined by the jury.

31. And although the opinions of experts are generally regarded as entitled to more weight and consideration than those of other witnesses, upon questions of mental soundness and capacity, yet it has been held, the jury are to give them only such weight, in deciding the case upon the whole testimony, as they think them fairly entitled to have.[45] And when we consider the conflicting character of testimony coming from experts; and often its one-sided and partisan character; and above all, the * tendency of the most mature and well-balanced minds, to run into the most incomprehensible theorizing and unfounded dogmatism, from the exclusive devotion of study to one subject, and that of a mysterious and occult character, we cannot much wonder that some of the wisest and most prudent men of the age are beginning to feel, that the testimony of experts is too often becoming, in practice, but an ingenious device in the hands of unscrupulous men, to stifle justice, and vindicate the most high-handed crime.[46]

[43] Heald *v.* Thing, 45 Me. 392.

[44] Walker *v.* Walker, 34 Ala. 469. But subscribing witnesses may. Id.

[45] Watson *v.* Anderson, 13 Ala. 202. And one who has had opportunity to observe the testator may express an opinion upon his sanity, although he cannot give a reason for his judgment. Stubbs *v.* Houston, 33 Ala. 555. But the opinions of medical men on the subject of mental capacity, whether as actual observers or experts, are to be received only in the form of evidence, and must be given in court, upon the trial of the cause, like other evidence, and cannot be received, upon the revision of the questions reserved, in banc or upon appeal, as to the law of the case. Delafield *v.* Parish, 25 N. Y. Rep. 9.

* [46] See Taylor on Poisons, and the London Law Review of that work. The following propositions may be of interest:

1. It is clear that experts are not obliged to give testimony upon mere *speculative* grounds, and where they have no personal knowledge of the *facts* in the case. If they have had personal knowledge of the testator, it may fairly be regarded as amounting to the knowledge of facts. But unless that is the case, a medical witness is not obliged to obey the ordinary witness subpœna, and will not be held in contempt for disobeying it. This has been so ruled at nisi prius in England within the last few years.

2. The expert is not obliged to examine books and precedents, with a view to

* 32. It may be proper to state, that in the trial of questions of mental capacity and soundness, it is always admissible to prove * the

qualify himself to give testimony; nor is he obliged to examine into the facts of cases, by personal inspection of individuals, whose state may be the subject of controversy in the courts.

3. It being purely matter of conventional arrangement between professional experts and those who desire to employ them, as witnesses, both in regard to their acting as such, and also their making preparation to enable them to give such testimony, it virtually places a price upon such testimony in the market, and its price is likely to range, somewhat according to its ability to aid one or the other of the parties litigant. The tendency of this is to render it partisan and one-sided, as a general thing.

Without intending to charge any want of good faith and fairness in professional experts, we cannot forbear to say, that it has become the universal testimony of the courts, that it is more likely to produce perplexity and uncertainty, than to relieve the doubts of the triers. We may be allowed here to refer to the high authority of Mr. Justice *Grier*, of the United States Supreme Court, in Winans *v.* New York and Erie Railway, 21 How. 100, upon this point: "Experience," said the learned judge, "has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses, and the correctness of their opinions, wasting the time and wearying the patience of both the court and jury, and *perplexing, instead of elucidating, the questions involved in the issue.*" We believe this will be the universal testimony of all judges, both in this country and in England, who have had much experience upon the subject. There must, therefore, it would seem, be something fatally defective in our mode of obtaining and applying this class of testimony. For it cannot be supposed, that, under proper regulations, there would be any difficulty in obtaining reliable scientific evidence, if the proper methods were resorted to.

And it seems to us that some mode should be devised, whereby the motive, which is now offered to this class of witnesses to testify so exclusively for one side, should be not only counteracted, but that it should be entirely removed, and a contrary motive, for impartiality, presented. The remedy will be characterized, in some degree, by the nature and cause of the difficulty to be removed. This we think depends largely upon the fact, that the experts are selected and paid by the parties, and come into court as the hired advocates of those who employ them. We mean no impeachment of this class of witnesses, but any man, when approached by the counsel of one party, and furnished only with the views and the facts of one side, and asked to give his opinion, naturally gives a one-sided opinion. And having committed himself to one side, he is thereafter rendered incapable of forming a fair and unbiassed judgment, upon the facts of the case. He becomes disqualified to act as a juror in the case. And when it is considered that his testimony is given to instruct, educate, and inform the court and jury, in regard to the proper mode of determining the case, and that it is no uncommon occurrence for a case to turn very much upon the scientific and professional testimony, it is no less im-

existence of insanity in any of the blood relations of the person whose mental condition is the subject of inquiry, whether such person be lineally or only collaterally connected.[47] But where the person is a lineal ancestor, not many degrees removed, and the form of mental unsoundness is similar in character to the one under consideration, the evidence will be regarded of much greater weight, than where the connection is only collateral, or the malady is not of the same specific character.

33. In an important case,[48] it was held not competent for a medical witness, who had not heard all the testimony in the case, to express an opinion in regard to the mental condition of the person in question, based upon the facts which had been testified in his presence. And even where the witness had heard all the testimony, it was held he could not express an opinion upon the very question before the jury. But he should say, whether, in his opinion, the facts testified, if believed, indicate insanity, and of what kind and with what degree of certainty.

34. It has been held admissible to show the declaration in favor of the sanity of the testator, of one who was a party to the record, opposed to the probate of the will.[49] And where a devisee or legatee is party to the suit, his declarations against the interest he is attempting to maintain are competent evidence.[50] But in an early case it was decided, that the declarations of a devisee, to the effect that the testator was insane, is not admissible to prove the fact.[51]

portant that the experts should be wholly uncommitted, in opinion, than that the jurors should be so.

It seems very obvious, therefore, that this class of witnesses should be selected by the court, and that this should be done wholly independent of any nomination, recommendation, or interference of the parties, as much so, to all intents, as are the jurors. To this end, therefore, the compensation of scientific experts should be fixed by statute, or by the court, and paid out of the public treasury, and either charged to the expense of the trial, as part of the costs of the cause, or not, as the legislature should deem the wisest policy. The mere expense of the experts, when selected in this mode, would be as nothing in comparison with the expense which now becomes unavoidable, in consequence of the enormous consumption of time in most of the trials of this class, by the unnecessary multiplication of experts, with a view, on either side, to overcome the adverse testimony of that character.

[47] Baxter *v.* Abbott, 7 Gray, 71; Snow *v.* Benton, 28 Ill. 306.

[48] The People *v.* Lake, 2 Kernan, 358.

[49] 2 Greenl. Ev. § 690; Ware *v.* Ware, 8 Greenl. 42, 56.

[50] Atkins *v.* Sanger, 1 Pick. 192.

[51] Phelps *v.* Hartwell, 1 Mass. 71.

And the same rule has obtained in other states.[52] And it has been held, that the declarations of a devisee or legatee under the will, who is a party to the record, but not * the only one interested in establishing the will, are not admissible to show the incapacity of the testator.[53]

35. In a late case[54] before the New York Court of Appeals, *Davies*, J., said: "In regard to the effect of a will being written or procured by one interested in its provisions, the maxim, qui se scripsit hæredem, has imposed, by law, an additional burden on those claiming to establish a will under circumstances which call for the application of that rule; and the Court, in such a case, justly requires proof of a more clear and satisfactory character. Such a condition is exhibited by the testimony in the present case. The two codicils under consideration were exclusively for the benefit of Mrs. Parish, with the exception of the charitable gifts, and although they were not actually written by her, yet they were drawn up at her suggestion, upon her procurement, and by counsel employed by her. She prepared and gave the instructions for them, and in judgment of law they must be regarded as written by herself: Facit per alium, facit per se.

36. The rule which should govern the court in such a case, * is enunciated in Barry *v.* Butlin.[55] It is there said, that "if a party

[52] Lightner *v.* Wike, 4 S. & R. 203; Nussear *v.* Arnold, 13 Id. 323.

[*53] Boyd *v.* Eby, 8 Watts, 66; Dotts *v.* Fetzer, 9 Barr, 88; Brown *v.* Moore, 6 Yerger, 272; Roberts *v.* Trawick, 13 Ala. 68; Blakey *v.* Blakey, 33 id. 611. And the same rule stated in the text is adopted in a late case in Ohio, Thompson *v.* Thompson, 13 Ohio N. S. 356.

[54] Delafield *v.* Parish, 25 N. Y. R. 9. This subject is discussed, and the cases commented upon, in Baker *v.* Batt, 2 Moore, P. C. C. 317. See also, Duffield *v.* Robeson, 2 Harring. 384; Tomkins *v.* Tomkins, 1 Bailey, 94; Durling *v.* Loveland, 2 Curteis, 225; Greville *v.* Tylee, 7 Moore, P. C. C. 320; s. c. 24 Eng. L. & Eq. 53. It is here held, that where a will is prepared by a medical man in attendance on a patient, by which the bulk of the estate is given to him, to the exclusion of the near relatives, the court will view his conduct with the utmost jealousy.

So also, where one under guardianship, as non compos, made a will in favor of his guardian, making him executor and principal devisee, it was held, that it must appear, beyond a reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid. Breed *v.* Pratt, 18 Pick. 115; Crispell *v.* Dubois, 4 Barb. 393; Beall *v.* Mann, 5 Ga. 456; Newhouse *v.* Godwin, 17 Barb. 236.

[*55] 1 Curteis, 637.

writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." By the Civil Law, such a will was rendered void, and it may be well doubted, whether we have acted wisely in departing from its just and rational provisions in this respect; and it is well said by the court, in Crispell *v.* Dubois,[56] that, though this rule of the Civil Law has not been adopted in our courts, yet they do demand satisfactory proof in such cases, that the party, executing the will, clearly understood and freely intended to make that disposition of his property, which the instrument purports to direct. The doctrine is well stated in Paske *v.* Ollatt,[57] that " where the person, who prepares the instrument and conducts the execution of it, is himself an interested person, propriety and delicacy would infer that he should not conduct the transaction.' "

[56] 4 Barb. 398; Hughes *v.* Meredith, 24 Ga. 325.

[57] 2 Phillim. 323.

*CHAPTER V.

EFFECT OF DRUNKENNESS UPON TESTAMENTARY CAPACITY.

1. Drunkenness, producing oblivion, incapacitates the testator.
2. Courts of equity do not interfere on the ground of drunkenness merely.
3. The extent to which drunkenness must be carried to create testamentary incapacity.
4, and 5. Cases illustrating the effect of drunkenness upon mental capacity.
6. There is no presumption of the continuance of this disability.
7. The burden of proof is upon the contestants. Late English case.
8. Late case in N.Y. Court of Appeals.

§ 16. 1. It seems now to be conceded, that intoxication, to the extent of producing mental oblivion, while that state continues, does deprive the party of the ability to enter into contracts, or execute a valid will.[1] In an important case,[2] the rule of disability from drunkenness, is thus laid down: "A contract entered into when the party is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable."

2. The general rule in the courts of equity as to contracts, has * been already stated,[3] and a similar rule applies to wills, that where there is no appearance of artifice in procuring the will, and it is reasonable in itself, it shall stand. The cases wherein this general question is discussed are numerous, and will be found satisfactorily digested in the elementary treatises, and in the opinion of Mr. Justice *Prentiss*, already referred to.[4] The courts of equity leave the

[1] Swinb. pt. 2, sec. 6. "He that is overcome with drink, during the time of his drunkenness, is compared to a madman, and therefore if he make his testament at that time, it is void in law. Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding. Otherwise, if he be not clean spent, albeit, his understanding is obscured, and his memory troubled; yet he may make his testament, being in that case." Ib. Arey *v.* Hill, 2 Add. 206; Billinghurst *v.* Vickers, 1 Phillim. 191; Wheeler *v.* Alderson, 3 Hagg. 602.

[2] Barrett *v.* Buxton, 2 Aik. 167. The opinion of Mr. Justice *Prentiss* in this case contains a full exposition of the law upon the subject.

[*3] Ante, § 12, n. 2.

[4] 1 Parsons on Cont. 310; 1 Story, Eq. Jur. §§ 231, 232; W. Story on Cont. § 27.

parties to their remedies and liabilities at law, unless where there has been virtual fraud in obtaining the contract; and the law excuses the party from his contract, on the ground of intoxication, when it is so excessive as to deprive him of all proper knowledge and understanding of the transaction.

3. An eminent English writer[5] upon medical jurisprudence, thus expresses himself, upon this subject: "Any deed or agreement, made by a party when drunk, is not invalidated by our law, except in the case where the intoxication has proceeded so far, as to deprive him of all consciousness of what he is doing." — "The law appears to have created two states in drunkenness; one, in which it has proceeded but a slight extent, and it is considered there is still a power of rational consent; another, in which it has proceeded so far that there is no consciousness of the transaction, and therefore the party can give no rational consent." And Pothier[6] adopts very nearly the same view. "Drunkenness," he says, "when it goes so far as absolutely to destroy the reason, renders a person, so long as it continues, incapable of contracting, since it renders him incapable of consent."

4. It is not important to discuss the effect of drunkenness upon mental capacity to contract, or execute a valid will, to any * great extent. Its effect in producing such disability is precisely the same as that of any other mental obscuration, from whatever cause. This is differently expressed in different cases, but the result is much the same in all. In Starret *v.* Douglass,[7] it is said, that drunkenness in the testator, of itself, is no legal exception to the validity of a will, but where, from habitual intoxication, a man's senses were besotted, and his understanding gone, he could make no will. We do not apprehend it could make any difference, in regard to the capacity to execute a will, whether the understanding were permanently gone, from habitual inebriety, or temporarily only, from an occasional, or accidental fit of drunkenness.

5. In Hight *v.* Wilson, it was held,[8] that habitual drunkenness

[5] Taylor, Med. Jur. 676.

[6] Obligations, 49, n.

[7] 2 Yeates, 48; Duffield *v.* Robeson, 2 Harring. 375, 383; *Harrington*, J., here says: "Drunkenness itself is a species of insanity, and might invalidate a will made during the drunken fit." It is here held, that delirium tremens, produced by drunkenness, is the same as insanity produced in any other mode, as to a testamentary incapacity; of which there can be no question.

[8] 1 Dallas, 94.

is not, of itself, sufficient to invalidate a will; and in Temple *v.* Temple,[9] that the frequent and injurious use of ardent spirits, with lucid or sober intervals, does not incapacitate the testator. This will depend, of course, upon the state of the mind, at the time of executing the will.

* 6. The incapacity produced by drink is more strictly temporary, than even the delirium of disease. And when the fit is off, the patient is at once restored to perfect reason. And no presumption arises in regard to the continuance of the delirium of drunkenness, since it ceases at once almost, unless the exciting cause is renewed.[10]

7. There is no doubt, that, where drunkenness is relied upon as producing testamentary incapacity, the burden of proof of its existence, at the time of executing the will, rests upon the contestants.[11] In a recent English case, tried before Lord *Campbell*, at nisi prius,[12] the will being impeached on the ground that the testator's mind was impaired by drinking, and was under undue influence on the part of the devisee, or his family, it appearing that the testator had been addicted to drinking, and had had delirium tremens a few days before the will was executed, and that the will was drawn up by the son of the devisee, and at his house, he being an old friend of the testator; it was held, that the question was, whether the testator was sane and sensible, and able to understand the nature and contents of the will at the time it was executed; and that if the testator had really requested the son of the devisee to draw up the will, and it was his voluntary and spontaneous act, not under constraint, and free from force or fraud, and from impo-

[9] 1 Hen. & Munf. 476. In Duffield *v.* Robeson, 2 Harring. 375, 383, 384, *Harrington*, J., said: "Long-continued habits of intemperance may gradually impair the mind, and destroy the memory, and other faculties, so as to produce insanity of another kind. The form of insanity usually produced by intemperance, is mania a potu, or delirium tremens; which is a raging and decided insanity that cannot be mistaken, temporary in its duration, and when off is followed not merely by a lucid interval, but by a permanent restoration to reason." "But," adds the learned judge, "long-continued indulgence in the use of stimulants to an inordinate degree, may produce "permanent — fixed insanity," in some temperaments. See also, Black *v.* Ellis, 3 Hill (S. C.), 68; Harper's Will, 4 Bibb, 244; McSorley *v.* McSorley, 2 Bradf. Sur. Rep. 188; Waters *v.* Cullen, ib. 354; ante, § 12.

[*10] Ayrey *v.* Hill, 2 Add. 206. It is here said, that insanity is often latent, but ebriety never.

[11] Andress *v.* Weller, 2 Green, Ch. 604, 608.

[12] Handley *v.* Stacey, 1 F. & Fin. 574.

sition or importunity, there was no undue influence, and the will was valid.

8. In a very recent case before the New-York Court of Appeals,[13] it was held, that neither intoxication, nor the actual stimulus of intoxicating liquor, at the time of executing a will, incapacitates the testator, unless the excitement be such as to disorder his faculties and pervert his judgment. The dispositions of the will may be considered, for the purpose of determining his condition at the time of executing it. But, in order to defeat the will upon this ground alone, such dispositions must not only be in some degree extravagant and unreasonable, but they must depart so far from what would be regarded as natural, as to appear fairly referrible to no other cause but a disordered intellect. The will of a confirmed drunkard, although executed after a protracted debauch, and although the testator had drunk several times during the day, at the time of executing it, was here confirmed.

[13] Peck *v.* Carey, 27 N. Y. R. 9.

*CHAPTER VI.

MANNER OF EXECUTION OF WILLS.

SECTION I.

MODE OF WRITING, AND FORM OF WILL.

1. The general provisions of law in regard to the execution of wills.
2. The requirement that the will be in writing, satisfied by printing, &c.
3. Will may be written in any mode, on any material.
4. May be in any language. Request, or direction, is a bequest.
5. The English rule, as to personalty, before 1838.
6. The form of a will unimportant; any paper treated as testamentary.
7. Similar laxity of construction has prevailed in the United States.
8. Not always held requisite the paper should have been intended to operate as testamentary.
9. But if made in the form of a will, it must be done animo testandi.
10. The ecclesiastical courts often admit numerous papers to probate.
11. The form of language in a will not important, if amounting to a direction.
12. Lord Cranworth's rule that it must be intended to control the party addressed.
13. The disposition of courts to uphold trusts, often carries them to extremes.
14. And a similar disposition manifested in regard to wills.
15. A will is not made conditional by assigning an uncertainty as a reason for its execution.
16. The point of inquiry in contingent testaments, whether the condition is of the essence of the instrument, or only the occasion of its execution.
17. If the paper is dependent upon a condition precedent, that must be performed.
18. If the paper is executed after the condition has lapsed, it is valid.
19. A devise may be in the form of a deed, and on condition subsequent.
20. Orders upon savings-banks properly attested held testamentary.
21. A printed residuary clause in a will, not read to the testator, forms no part of the will.
22. A letter written to the devisee admitted to probate.
23. Where there are discrepancies between the draft, and the engrossed copy; former control.
24. Joint wills, when proved, how far revocable.
25. Mutual wills not revocable in equity, after the death of either.

*§ 17. 1. THE rules of statutory enactment, which obtain in most of the American states, have been adopted with reference to the English statute of frauds,[1] with more or less modification, in

*[1] 29 Car. II. ch. 3, § 5.

some cases, but generally of an unimportant character. The present statute of wills, in England,[2] is so recent (1 January, 1838), that the decisions under it, will not afford so much aid, in the American courts, as the earlier English decisions. In some particulars, however, as where the present English statute is similar to the former statute, or where its modifications had been adopted from the legislation of this country, or where those provisions have been transferred here, since the enactment of the late English statute, the recent English decisions will be found of essential service in this country.[3]

2. The English statute of frauds expressly required that a will of lands should be in writing. But it has been held that a will written in pencil instead of ink would be good.[4] So too, if a portion, or the whole of the will, be in print, engraving, or lithograph, it is no doubt a sufficient compliance with the statute.[5]

3. One may write his will upon any material, and in any mode, but, under the statute of frauds, these circumstances were often very significant, upon * the question whether the writing was preliminary and provisional merely, or the definite and determinate act of the testator, done animo testandi.[6] So also in regard to alterations in a will, made in pencil, it will always excite, more or less apprehension, that they were made subsequent to the execution, and therefore, form no legal part of the instrument. Hence in the Prerogative Court of Canterbury, it has been established, by repeated decisions, that where alterations in *pencil* are made, in a

[2] 1 Vict. ch. 26, § 9.

[3] We have not attempted to point out all the minute distinctions between the statutes of the different states, in regard to the execution of wills; nor have we referred to those decisions which have reference exclusively to local statutory requirements, and where, by consequence, they could be of no general interest to the profession. We have pursued the same rule in regard to the English decisions. With this qualification, which seemed indispensable, if we would confine our labors within reasonable limits, we have intended to refer to such of the leading and important cases, as were of general interest, and especially where any conflict existed.

[4] In re Dyer, 1 Hagg. 219.

[5] 2 Bl. Com. 376, Chitty's notes. See also, Schneider *v.* Norris 2 M. & S. 286. It has long been settled, that where a statute requires the formality of writing, printing is a sufficient compliance. Temple *v.* Mead, 4 Vt. 536; Henshaw *v.* Foster, 9 Pick. 312.

[6] Rymes *v.* Clarkson, 1 Phillim. 35; Parkin *v.* Bainbridge, 3 Phillim. 321.

will of personalty, they are to be regarded as *deliberative* only, but when in *ink*, they are prima facie, *final* and *absolute*,[7] as in a will of personalty, under the former English statute, such alterations require no formal attestation, when definitively made after the execution of the will.

4. It seems to be well settled, that the testator may put his will, in any language he may choose.[8] And it is sufficient to * create

[7] Hawkes *v.* Hawkes, 1 Hagg. 322; Edwards *v.* Astley, 1 Hagg. 490; Dickenson *v.* Dickenson, 2 Phillim. 173; Lavender *v.* Adams, 1 Add. 406.

[8] Green *v.* Skipworth, 1 Phillim. 58. At an early day, before the law, in regard to the construction and explanation of the writing of a will, was very clearly defined, it was common, in the courts of equity, to refer any question of uncertainty which arose upon the face of a will, to the master, and the same course is now allowable. It is, however, now done with more specific instructions as to the course to be pursued than was formerly the practice. In Masters *v.* Masters, 1 P. Wms. 421, 425, it was ordered, that "where a will was *writ* blindly, and hardly legible, and as to the money legacies *writ* in figures, it be referred to the master to examine, and to see what those legacies were, and he to be assisted by such as were skilled in the art of writing." The question here referred to the master was, whether a legacy of £200 to Mrs. *Sawyer* was by the testatrix intended for Mrs. *Swopper*, who claimed it, "and if the master should find that she was the person intended, then she to receive her legacy," which, in modern times, would be regarded as a remarkable decision. But there can be no objection, at any time, in referring a matter of blind writing to those skilled in such matters, any more than in asking the aid of one skilled in abbreviations, or in cipher, or a foreign tongue, to translate the same, post, § 41.

"The Roman law did require the witnesses to a Latin will, to understand the Latin language: 'nam si vel sensu percipiat quis, cui rei adhibitus sit sufficere. It is admitted by the Civilians that a testator may dictate his will in his own * language, and the will may be drawn in another, provided that the witnesses, and the notary, understand both. The object of the law is, that the instrument shall express the intentions of the testator, and it does not require the reproduction of his exact words. Whether the witness should understand the language of the will, has been the subject of much contest among those writers, and names of authority may be cited in favor of either opinion. But the current of judicial authority seems to have decided, it is not necessary that the witnesses to a testament should comprehend the language in which it is written. And the same authority has settled, that the witnesses should understand the language of the testator." Mr. Justice *Campbell*, in Adams *v.* Norris, 23 How. 366. But this was said of a California will, where the Civil Law prevails to a large extent. We doubt if the common law will allow of a written will being expressed in a language not understood by the testator. That would seem indispensable to any understanding execution of the instrument. It might not be equally indispensable for the witnesses to comprehend the words of the will, if they were able to communicate with the testator, and signed an attestation clause in their own language. Breaux *v.* Gallusseaux, 14 Louis. Ann. 233; post, n. 20.

a bequest, if the testator expresses his desire in regard to the disposition of the property.[9] A direction that the executor shall receive the balance of the estate, will amount to a residuary bequest.[10]

5. According to the decisions of the English ecclesiastical courts, under the old law, before 1838, where the definite instructions of the testator, if reduced to writing during his lifetime, constitute a valid will of personalty, frequent questions have arisen, whether such instructions were to be regarded as definitive, or merely preliminary. As no such rule, in regard to the execution of wills, has existed in England since 1838, and as such now exist in this country, only to a limited extent, we have not deemed it expedient to encumber the text with a formal discussion of the cases upon the point.[11] Such questions could only arise in those states where no formal mode of * attestation to a will is required, or where olographic wills are allowed.

[9] Passmore *v.* Passmore, 1 Phillim. 218.

[10] Miars *v.* Bedgood, 9 Leigh 361; post, pl. 11, 12, 13.

[11] Lomax's executors, ch. 2, and numerous cases cited.

*[12] 1 Jarman on Wills, 114 and notes. The following abstract of the English cases upon the rule applicable to wills of personalty under the statute of frauds, may be useful: Instructions for a will may, by the ecclesiastical law, be as operative as a will itself (Heberfield *v.* Browning, 4 Ves. 200, in n.; 1 Wms. Exrs. 51–57, 86, 89, 4th ed.), although if a paper be superscribed "heads of a will," or "plan of a will," the inference would be from this, that it was intended that a more formal will should be drawn out, 1 Phillim. 350. See Hocker *v.* Hocker, 4 Gratt. 277: yet in a case where such an instrument was dated and signed, and indorsed, "intended will," and alterations in it afterwards made in a formal manner, and the deceased declared, upon being taken ill, "that he had written over the heads of his will, and signed it; that it would do very well;" the paper was established as a will. (Bone *v.* Spear, 1 Phillim. 345; see Popple *v.* Cunison, 1 Add. 377; Barwick *v.* Mullings, 2 Hagg. 225; Lillie *v.* Lillie, 3 Hagg. 184.)

We have stated many of these cases more in detail in other portions of the work, as illustrative of other points, where they arise. See Hattat *v.* Hattat, 4 Hagg. 211; post, pl. 14. It is not always easy to choose between a repetition and too many references backwards, and forwards.

In another case, Torre *v.* Castle, 1 Curt. 303, the question was, whether a document was entitled to probate as a part of the testamentary disposition of Lord Scarborough: It was all in the handwriting of the deceased, and was subscribed, by him, and dated 11th of Oct. 1834. At the commencement it was described to be, "head of instructions to my solicitor, J. Lee, to add to my will the codicil following." It went on to state what the contents of the codicil were to be. There were initials for several of the legatees, with the words, &c., &c., in many parts of it. But it concluded in these words, "This is my last will and testament,

6. It is perhaps true, as said by Lord *Hardwicke*,[13] that "there is nothing which requires so little solemnity as the making of a * will of personal estate, according to the ecclesiastical laws of this realm, for there is scarcely any paper writing which they will not admit as such." And all writers upon the subject agree, that before the late English statute,[14] almost any form of instrument, or memorandum, might operate as a testamentary disposition of

Scarborough," and was indorsed, "Memm. to J. Lee — Will — Oct. 11, 1834." Sir *H. Jenner Fust* pronounced for the validity of this paper, and decreed probate thereof, being satisfied by parol evidence, and the circumstances of the case, that the deceased intended the paper to have full operation, in case any thing should happen to him before he had an opportunity of going, or before it was convenient for him to go to Mr. Lee, for the purpose of having a more formal instrument prepared. And on appeal to the Privy Council, the Judicial Committee affirmed this decision. Castle *v.* Torre, 2 Moore, P. C. C. 133. But it should be remarked, that the paper, in this case, was not regarded as amounting to an actual testamentary disposition, and entitled to probate, proprio vigore, but as instructions fixed and final, containing the settled intentions of the writer, up to the last moment of his life, and only prevented from being formally carried into execution, by his own sudden death. 2 Moore, P. C. C. 175.

It should be observed, that in these cases, where the character of the paper is upon the face of it equivocal, the case is open to the admission of parol evidence of the testator's intention, as to whether he meant the instrument as memoranda for a future disposition, or to execute it. Mathews *v.* Warner, 4 Vesey, 186; 5 Vesey, 23; Mitchell *v.* Mitchell, 2 Hagg. 74; Coppin *v.* Dillon, 4 Hagg. 361; Salmon *v.* Hays, 4 Hagg. 382; Torre *v.* Castle, 2 Moore, P. C. C. 154.

There are many American cases where wills of personalty have been maintained upon grounds similar to those above stated. In Watts *v.* The Public Administrator, 4 Wend. 168; s. c. 1 Paige, Ch. 347, where a testamentary paper was found in an iron chest, among the valuable papers of the deceased, without being signed by the testator or by witnesses, but there being an attestation clause, and the will appearing to be made by the testator, with his name at the beginning, the Court of Errors reversed the decree of the Chancellor, and held the will valid as to the personal estate. The reason of the case, and the law, would seem to be with the Court of Chancery; but being one of those hard cases, which make so much bad law, it is not wonderful to find the court of last resort, especially when it is numerous, yielding to the pressure of strong equitable considerations. The following cases in South Carolina, embrace the same principle: Witherspoon *v.* Witherspoon, 2 McCord, 520; McGee *v.* McCants, 1 id. 522; Milledge *v.* Lamar, 4 Dessaus. 623. In the former of these cases, *Johnson*, J., said: There were numberless cases, in which papers wanting the signature of the testator, have been admitted to probate; but always on proof of extrinsic circumstances, to show the animum testandi.

[13] Ross *v.* Ewer, 3 Atk. 156.

[14] 1 Vict. ch. 26.

personal estate, if only made with a view to have it operate upon property rights after the decease of the maker.[15]

* 7. And similar laxity of construction has prevailed in many of the American states, under similar statutes. As where the payee of a promissory note, made a special indorsement to the effect that, if he were not living at the time of its payment, he ordered the contents paid to a person named, and died before the note was paid, the indorsement was held to be of a testamentary character, and entitled to probate as a will.[16] But papers of a similar character, depending upon contingency, which had not clearly transpired, have been denied the testamentary character.[17] And a deed, which in terms was not to operate until after the decease of the grantor, has been held testamentary, and as such admitted to probate.[18] And there have been cases where a will, defectively executed as a will of real and personal estate, has been admitted to probate as a testamentary disposition of personal estate.[19] But the presumption is always against an imperfect paper operating as testamentary, even where the law of the state requires no particular formalities in the disposition of personalty. And where the paper, on its face, is equivocal, in order to be treated as testamentary, it must clearly appear that it was intended by the maker to operate as a disposition of his estate after death.[20]

8. But the English ecclesiastical courts have held that it is not requisite, in order to have a paper operate as testamentary, that the maker should have so intended, in all cases; since if the paper contains a disposition of property of the maker, to become, or to be operative after the death of the maker, but was not intended by him to operate as a will, but as a settlement, or a deed of gift, or a bond, if it cannot, for any reason, operate in * that form, the courts have sometimes allowed it to operate as testamentary.[21]

9. But it is not to be inferred from this, that a paper which was

[15] 1 Wms. Exrs. 90, 91, and cases cited.

[16] Hunt *v.* Hunt, 4 N. H. 434. But such an indorsement could not operate as a donatio mortis causa. See post, pt. 2, § 42. pl. 5.

[17] Wagner *v.* M'Donald, 2 Har. & J. 346; Todd's Will, 2 Watts & S. 145.

[18] Gage *v.* Gage, 12 N. H. 371; Ingram *v.* Porter, 4 McCord, 198; Milledge *v.* Lamar, 4 Dessaus. 617.

[19] Guthrie *v.* Owen, 2 Humph. 202.

[20] 1 Wms. Exrs. 91, 92, and cases cited.

[21] Bartholomew *v.* Henley, 3 Phillim. 318. See also, Masterman *v.* Maberly, 2 Hagg. 247; post, n. 41.

not intended to have any operation, as a paper drawn up in the form of a will, but not in seriousness and earnest, animo testandi, or as merely preliminary to the settling of a will, can have any such operation as stated above.[22]

[22] Nichols *v.* Nichols, 2 Phillim. 180; Trevelyan *v.* Trevelyan, 1 Phillim. 153; Swinb. pt. 1, § 3, pl. 23, 24, 25. The words of this early writer are here very significant. That whatever a man may say, as to his present purpose, in regard to the future disposition of his estate, is no will, "unless it be proved that the testator, at the time when the words were spoken, had animum testandi, that is to say, a mind or purpose then and thereby to make his testament or last will." . . . "So when the testator doth only foretell," or "much less when as any man rashly, boastingly, or jestingly affirmeth, that he will make this man his executor, when he hath no meaning at all, neither at that time or at any other time, to make him executor. For without meaning, or consent of mind, the testament is altogether without life, and is no more a testament than a painted lion is a lion."

It may be useful to remember, that where the paper offered for probate bears upon its face the form and character of a will, the presumption of law will be in its favor, and will thus impose upon those who contest the probate, the burden of showing that it was not in fact executed animo testandi. And on the other hand, where the paper is not apparently designed for a will, those who claim to have it operate as such will assume the burden of showing that it was so executed that it can fairly be allowed to have such an operation. 3 Hagg. 221; Griffin *v.* Ferrard, 1 Curteis, 100; Coventry *v.* Williams, 3 Curt. 790, 791; post, n. 27.

Since writing the foregoing, strangely enough, the decision of Sir *J. P. Wilde*, of the Court of Probate, in England, in Lister *v.* Smith, 10 Jur. N. S. 107 (1874), has reached us, and we there find, what we regard as a full confirmation of the preceding suggestions. The case is of so much interest upon the question, and so generally inaccessible to the profession here, that we shall give the summing up to the jury, and the opinion of the learned judge, at length, as being the most valuable commentary we could give.

Sir *J. P. Wilde*, in summing up, said: "The facts of the case lie in a very small compass, but the question is of great importance; for if, after the death of a testator, a person who had been present at the execution of a will, solemnly signed and attested, can set aside that will, by swearing that the deceased, who executed it, meant it to have no operation, but to be a mere piece of waste paper, all wills will be deprived of much of that sancity and security which now attaches to them. The simple question for you to answer is, whether you are satisfied that the codicil was intended by the deceased to be a mere piece of waste paper, nothing but a sham. I must tell you the presumption is, that it was intended to be an effective instrument, and it is the duty of those who contend otherwise to establish that proposition very clearly."

The jury found that the deceased did not sign the paper with the intention it should have a testamentary operation. Dec. 22. Tristram, on behalf of the executors, moved for probate of the will only.

Sir *J. P. Wilde:* "This is a most remarkable case, and one which, since the trial, has given me some anxiety. The question raised is, whether a certain codicil

* 10. It is not uncommon in the ecclesiastical courts to admit numerous papers to probate, as constituting, in the whole, the * will is or is not entitled to be admitted to probate. It is regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of his family to give up a house, which she then occupied, and that to force her to do so, he made pretence of revoking, by codicil, a bequest which he had made by will in favor of the daughter-in-law of this woman, and that the paper in question was made with that sole object; that the testator sent his attoney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all. Further: that the attorney pointed out the folly of executing such an instrument, and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator, with express directions that he was not to part with it; and that it was in no event to operate, or to revoke the bequest made in his will, but to be used only in the manner above described.

" Similar declarations were made by the testator at the moment of its execution. A codicil thus duly executed in point of form, and attested by two witnesses, has been directly impeached by parol testimony. It bears all the appearance, on the face of it, of a regular testamentary act; but on the evidence, it has been found by the jury not to have been intended as such by the testator. The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency * to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was, in reality, the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such no doubt, is the law. There must be the animus testandi. In Nichols *v.* Nichols (2 Phillim. 180), the court refused probate of a will regularly executed, which was proved to have been intended only as a specimen of the brevity of expression of which a will was capable; and in Trevelyan *v.* Trevelyan (1 Phillim. 153), the court admitted evidence, and entertained the question whether the document was seriously intended or not. In both cases, the court held, that evidence was admissible of the animus testandi; and to the same effect is the authority of Swinburne, pt. 1, § 3, pl. 23, and Shep. Touch. 404. The analogies of the common law point the same way. A deed delivered as an escrow, though regularly executed, is not binding; and in Pym *v.* Campbell (6 El. & Bl. 370), the Queen's Bench held, that a regular agreement signed by the party might be avoided, by parol evidence that at the time of its signature it was understood that it should not operate unless a certain event happened. There can therefore be no doubt of the result, in point of law, if the fact is once established. But here I must remark, that the court ought not, I think, permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one

of the testator.[23] And the same rule has prevailed, to a considerable extent, in the different American states.[24] There are some late English cases, where letters or informal papers, if executed in the presence of the requisite number of witnesses to render a will valid, have been admitted to probate. Thus in the case of Mundy in re,[25] where the testator, on his death-bed, signed a letter to his brother, which had been written in pencil at his dictation, and his signature was attested by two witnesses; all that is required in any case by the present English statute; * and the letter contained the following clauses: "It is my death-bed request that you will consent to charge the estates with a sum, to be equally divided among our dear brothers and sisters, and that it shall be raised and paid as soon as possible after my death. I make this request knowing it is not legal, but trusting in your affection," &c. And it was held, that the letter was testamentary, and entitled to probate. And in the case of Newns in re,[26] where the testator, ten years after the date of his will, executed another testamentary paper, giving directions as to the disposition of his estate, in case his executors should omit to prove his will, it was held, that the paper being testamentary, and duly executed, although not to operate until sometime after the death of the testator, it was entitled to probate, and that the person named therein as executor (the executors named in the will having deceased in the lifetime of the testator), must take probate of the will as well as of the subsequent paper.[27]

11. It does not seem essential to the validity of a will, that it should adopt any precise form of language in making its dispositions. The same rule obtains which does in regard to the creation of trusts, and any language which shows an intention to have the instrument operate to control the title, after the death of the testator, will be sufficient. The following forms of expression have been held sufficient.[28] "It is my wish;"[28] "earnestly con-

way or the other, and they do so sometimes on proof, amounting almost to demonstration, at others, on a mere balance."

[23] 1 Wms. Exrs. 93; Sandford *v.* Vaughan, 1 Phillim. 39, 128.

[24] Tonnele *v.* Hall, 4 Comst. 140.

[25] 7 Jur. N. S. 52.

[26] 7 Jur. N. S. 688 (1861).

[27] Where the paper is not *clearly* testamentary upon its face, the burden of proof is upon the party propounding it to show that it was so intended. Thorncroft *v.* Lashmar, 8 Jur. N. S. 595; Cooper in re, id. 394; post, § 39, pl. 4; ante, n. 22.

[28] Brunson *v.* King, 2 Hill, Ch. 490.

jured,"[29] "most earnestly wish,"[30] "recommend.[31] So also, any form of expression indicating desire, or request, may be allowed to operate as a valid disposition.[32]

* 12. This question is placed in a very clear light by Lord *Cranworth*, Vice-Chancellor,[33] in the following language: "The real question, in all these cases, always is, whether the wish, or desire, or recommendation, that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." This same rule was adopted and acted upon by Vice-Chancellor *Wood*, in a recent case.[34] And it is well illustrated by two late English cases. As where a bequest was made to the testator's wife, declaring that, although he had given the whole of his property, by his will, to his wife, yet it was his desire, if his children conducted themselves to her approbation, she should leave such property equally among them all, it was held to create a trust in favor of the surviving children.[35] But where the testator left all the residue of his property, real and personal, to his wife, with power to dispose of the same, among all his children, in her discretion, it was held to be an absolute gift to the wife.[36] We shall recur to this subject under trusts.

13. There are many cases in the English books, where the disposition of the courts to construe almost any form of request, or opinion, or desire, in a will, into a binding obligation upon the party to whom it is addressed, has carried them to very extreme

[29] Winch *v.* Brutton, 8 Jur. 1086.

[30] Young *v.* Martin, 2 Y. & C. 582.

[31] Cunliffe *v.* Cunliffe, Pr. in Ch. 201.

[32] 2 Story, Eq. Jur. §§ 1069, 1070; 1 Wms. Exrs. 93, 94, and Mr. Fish's notes of cases, English and American. See also, 1 Jarman, 341–348. A paper expressing a wish to give certain sums, and that neither executors nor heirs will object to carrying out this my will, is testamentary. Carle *v.* Underhill, 3 Bradf. Sur. Rep. 101. So also, of a Scotch deed of disposition and settlement. Matter of Easton, 6 Paige, 183. So a letter contemplating the writer's death, and requesting the person to whom it is addressed to put others in possession of his property. Morrell *v.* Dickey, 1 Johns. Ch. 153.

[33] Williams *v.* Williams, 1. Sim. N. S. 358.

[34] Bernard *v.* Minshull, Johnson, 276.

[35] Bonsor *v.* Kinnear, 6 Jur. N. S. 882; Liddard *v.* Liddard, 6 Jur. N. S. 439.

[36] Howarth *v.* Dewell, 6 Jur. N. S. 1360; post, § 43.

* lengths. This is well presented in Mr. Justice Story's commentary upon the point.[37]

14. The courts have manifested a similar forwardness, under the statute of frauds, to construe the most informal documents and entries into wills of personalty, and, not unfrequently, where they were obviously deliberative, and not final, in their character. Thus an entry in an account book, containing a full disposition of her property, and the appointment of an executor, dated eight months before the death of the testatrix, which was sudden ; and subscribed and carefully preserved, was declared testamentary, and probate granted, notwithstanding it contained clear words indicating that it was merely preliminary to a final disposition of her estate by will, namely : " I intend this as a sketch of my will, *which I intend* making on my return home." [38] And mere instructions to one's solicitor, giving specific directions for preparing a codicil to his will, as we have seen, have been admitted to probate as a will of personalty.[39] But this was done upon the ground, that final instructions for a will were of the same validity as a will itself, where the final consummation of the act was hindered by the death of the testator.

15. And where the testator stated, that, " being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will," it was held, that this was not a conditional will. The instrument taking effect as a will, is not made to depend, upon the event of the return or not, of the testator from his journey ; there is therefore no reason for annulling the will on the ground that it was conditional.[40] But an instrument having some of the characteristics of a deed, and some of those of a will, executed by a native of Scotland, about to remove from the country, and to take possession of an estate * in America, and professedly made to prevent disputes in case of his death, is contingent, and will not operate to defeat the claims of his wife, whom he married subsequently in America.[41]

16. As questions of a very embarrassing nature often arise in regard to the proper testamentary character of papers left, in the

[*37] 2 Story, Eq. Jur. § 1069 ; post, § 43.

[38] Hattat. *v.* Hattat, 4 Hagg. 211.

[39] Torre *v.* Castle, 1 Curt. 303 ; ante, n. 10 ; s. c. 2 Moore, P. C. C. 133.

[40] Tarver *v.* Tarver, 9 Pet. U. S. Rep. 174.

[*41] Jacks *v.* Henderson, 1 Dessaus. 543.

form of a will, but expressed in terms more or less contingent, it must be borne in mind, that, in that class of instruments, the question must turn upon the point, whether the contingency is referred to, as the *occasion of making* the will, or as the *condition* upon which the instrument is to *become operative*. Ordinarily, where the instrument is executed, with all the requisite formalities, it will be presumed to have been done, animo testandi, notwithstanding that it may be expressed to have been made to avoid the contingency of dying intestate, in case the testator should not return from a contemplated journey. In such a case, in order to render the instrument contingent, in its operations, it should clearly appear by its language, that it was not intended to remain as an operative will, except in the event of the failure to return.

17. The course of the English decisions upon the subject leads to the conclusion, that, where the will is clearly made dependent upon a condition precedent, in its very terms, it cannot be upheld as a will, unless the condition is performed As where the testator made his will in these words: "If I die before my return from my journey to Ireland, all my house and land at F——, and all the appurtenances and furniture, &c., to be sold," and legacies were bequeathed out of the avails. The testator, after making the will, went to Ireland, and returned to England, lived some years afterwards and died, and the will was held to be contingent. And Lord *Hardwicke* decided, that the will depended so exclusively upon the condition of the * testator dying before his return from the journey in contemplation, that it could not be shown, in regard to such a will of real estate, under the statute of frauds, that the testator continued to treat it as his will, after his return, as that would be to set up the will by parol, which could only be done properly by a re-execution, in conformity with the statute.[42] And the same rule

[42] Parsons *v.* Lanoe, 1 Vesey, 189; s. c. Ambler, 559; Sinclair *v.* Hone, 6 Vesey, 608. In the recent case of Damon *v.* Damon, 8 Allen, 192, a will thus expressed, — "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this my last will and testament, in manner and form following: First, If by any casualty, or otherwise, I should lose my life during this voyage, I give and bequeath to my wife," &c., and afterwards gave independent bequests, and spoke of the instrument as his last will and testament, — the testator having made the voyage and returned in safety, and afterwards died, was held entitled to probate, upon the authority of Parsons *v.* Lanoe, without passing upon the question whether the devises in the first clause were to be held conditional or not. But in a late case in Kentucky, Dougherty *v.* Dougherty, 4 Met. 25, where the will was thus expressed, —

has been followed by a considerable number of recent English cases.[43] Thus, where a master mariner being about to sail from Liverpool to Wales, made a will, which contained the following clause: "Should any thing happen to me on my passage to Wales, or during my stay there, I leave all my goods," &c. The testator returned from that voyage, and evidence was offered of his recognition of, and adherence to the will, subsequently; but it was held, that the will was conditional, and that no evidence could be received to show that the testator intended it to operate, after the time limited by the condition had expired. And in another case,[44] the testator stated, in the paper claimed to be his will, that he was about to embark for foreign parts, and in case of his decease during his absence being fully ascertained and proved, he made certain bequests. He returned from that voyage, and subsequently left England, and was supposed to have died in Australia. It was held the paper was conditional, to operate only if the testator died upon his then intended voyage; and that, as he returned from it, the will had no further effect.

18. There is a very recent case in the English Court of Probate, where the testator wrote his will in contemplation of a long journey, thus: "In contemplation of a long journey, should God not permit me to return to my home, I make this my last will and testament." The deceased made the journey and *returned home, and subsequently executed the will, by acknowledging his signature in the presence of two witnesses, and it was held, that the event having happened before the will was executed, it ceased to be conditional, and must be admitted to probate.[45]

"As I intend starting in a few days to the State of Missouri; and, should any thing happen that I should not return alive, my wish is, that all my land," &c. [going on to devise an estate], — the testator having returned to Kentucky, and died, the instrument was held contingent, and inoperative as a will. It was here held that the acts and declarations of the testator, both oral and written, are not sufficient to constitute a reëxecution or republication; and a query is suggested, how far it is competent to revive such an instrument after the happening of the event upon which it becomes inoperative, by any kind of reëxecution or a republication. But of this we should think there could be very little question.

[43] Roberts *v.* Roberts, 8 Jur. N. S. (1862), 220.

[44] In re Winn, 7 Jur. N. S. 764 (1861).

*[45] In re Cawthorn, 10 Jur. N. S. 51 (1864); S. C. 3 Sw. & Tr. 417. This seems to be the latest declaration of the present state of the English law as to conditional wills, required to be executed before witnesses. Wills of personalty, executed before 1838, which might be validly done by parol, when made dependent upon

*19. Where a person, being in India, executed the following instrument: "Know all men," &c., "that I make," E. my "lawful attorney for me, and in my name and to my use to ask, demand," &c. "And I do empower her, the said" E. "to hold and retain all proceeds of the said property for her own use, until I may return to England, and claim possession in person, or in the event of my death, I do hereby in my name assign and deliver to said" E. "the

similar contingencies, were often upheld upon the ground that the testator continued to recognize the instrument, as his will, until the time of his death. Strauss *v.* Schmidt, 3 Phillim. 209; Ingram *v.* Strong, 2 Phillim. 294; Forbes *v.* Gordon, 3 Phillim. 625. It was held, in Wagner *v.* M'Donald, 2 Har. & J. 346, that a paper written in the form of a letter, thus: "If I should not come to you again, my son shall pay," &c., evidence being given that the writer went to Kentucky, and returned home, and lived several weeks after; as the writer had returned before his death, the paper could not be admitted to probate. See also, Broadus *v.* Rosson, 3 Leigh, 12. The expression, "lest I die before the next sun, I make this my last will," held not to create a contingency affecting the instrument; adherence being shown by its careful preservation. Burton *v.* Collingwood, 4 Hagg. 176; In re Ward, 4 Hagg. 179. In Todd's Will, 2 Watts & S. 145, it was held, that an instrument, limited by a condition as to its operation, becomes wholly inoperative after a failure of the condition, and cannot be admitted to probate. See Johnston *v.* Johnston, 1 Phillim. 485.

The question was considered in Ex parte Lindsay, 2 Bradf. Sur. Rep. 204, where the will began: "According to my present intention, should any thing happen to me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of H.," &c. The testatrix proceeded safely to St. Louis, and subsequently returned to New York, where she died. It was held, that the validity of the instrument must be tested by the proof of its original execution, and by its contents, without the aid of parol evidence as to the intention of the testatrix by its subsequent recognition; that a condition in a will in order to defeat the probate, must appear upon the face of the instrument, and go to its entire subversion. If the condition is of partial application, and does not express that the entire instrument is to take effect, or fail, upon a particular event, probate will be granted, and the effect of the condition upon particular legacies be left to future construction. That in the present case, the prefatory words appeared to give the occasion for making the will, and not to express any clear condition upon which its validity was to depend, it was therefore admitted to probate. See also, Thompson *v.* Connor, 3 Brad. Sur. Rep. 366. Since the publication of the first edition of this work, the case of Thome in re, 11 Jur. N. S. 569, has been decided, 1865. An officer, by order of the military authorities, proceeded to the Gold Coast, Africa; and, before the expedition had actually started, he made his will in the following form: "In the event of my death while serving in a horrid climate, or any accident happening to me, I leave and bequeath," &c., the testator returned from the expedition, and died in London. Sir *J. P. Wilde* was of opinion the will was not conditional upon the testator dying upon the expedition, and decreed probate of the same.

sole claim to the before-mentioned property, to be held by her during her life, and disposed of by her, as she may deem proper, at the time of her death ; at the same time, I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of said E.'s occupancy shall be considered at an end."

The instrument was acted upon as a power of attorney ; afterwards the maker died in India, without having returned to Great Britain, and it was held that it operated as a devise to E. Lord *Denman*, Ch. J., said : " I cannot see the least ground for doubt in this case. . . . If a man, being in India, by a deed-poll gives something to his mother, and adds, ' I also devise and bequeath,' so and so, why are we to say that is not a will ? What principle of law is there to prevent it from being a will ? We are called upon to create a new and arbitrary rule, for the purpose of getting rid of a disposition of property, made in the event of the death of the party disposing." [46]

20. Where one being informed that he could not recover from his present illness, expressed a wish, that his wife should be in a condition to receive, at his death, certain sums of money in two savings-banks, and signed, in the presence of two witnesses, orders for the payment of the money to her, by the banks, * and died the day after, the court granted administration to the widow, with the orders annexed, as containing the will of the deceased.[47]

21. Where a will was executed, giving all the testator's property to his wife, but contained a printed clause giving the residue among the children of the testator, which was not read to him, it was held that it formed no portion of the instrument, and should be omitted in the probate.[48]

[46] Doe d. Cross *v.* Cross, 8 Ad. & Ellis, N. S. 714.

* [47] Marsden in re, 1 Swab. & Trist. 542. The rule is here reaffirmed, that where one claims probate of a paper not apparently of a testamentary character, or not clearly so, upon its face, the burden of proof is upon that person, to satisfy the court that it was executed animo testandi. An expression of a wish that a certain person shall continue in the care of the testator's estate after his decease, is not testamentary. Thorncroft *v.* Lashmar, 8 Jur. N. S. 595 ; post, § 43.

[48] M'Cabe in re, 2 Swab. & Trist. 474. Where a clause is accidentally introduced into a will, without any such instructions from the testator, and he executes the same without knowing of such clause being in the paper, it forms no part of the will, and probate will be granted of the remainder of the paper, omitting such clause. Duane in re, 8 Jur. N. S. 752.

22. Where a person had changed his mind after the first execution of his will, in regard to one important devise, and by a codicil directed that the devise should go to another, and subsequently determined to restore the devise, but in the mean time had rewritten his will, making the first proposed alteration in the name of the devisee, but after his return to his first purpose, destroyed the last will, and at his death, the first will with codicils, made after the date of the last will, were found preserved by the testator, in an envelope together, and the date of the sealing certified by the initials of the testator; and it appeared that the testator, not long before his decease, had written a letter to the first devisee confirming the devise to her, which letter was duly attested, the court granted probate of the will, as contained in the letter and the papers inclosed in the sealed envelope.[48]

* 23. Questions have often arisen in the English Court of Probate, in regard to discrepancies between the final, revised, draft-will, and the engrossed copy, which the testator executed, without careful comparison. The testator, in a recent case,[49] executed a draft-will in April, 1847, and in May of the same year, he executed an engrossed will. In September, 1854, he executed a codicil, purporting to be a codicil to his last will of April, 1847. It was supposed, that he really intended it to be a codicil of the will of May, 1847. The draft-will contained interlineations in the handwriting of the testator, in ink, and in pencil, and cancellations. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed will from the draft-will, with which it agreed, so far as the alterations in ink were concerned, but not as to those in pencil. Probate was decreed of the draft-will of April, 1847, including the alterations in ink, (but not those in pencil,) in so far as they agreed with the will of May, 1847, together with the codicil of 1854.

24. Two or more persons may execute a joint will, which will operate the sa meas if executed separately by each, and will be entitled to probate upon the decease of either, but will require a separate probate upon the death of the other.[50] But if the will so

[49] Wyatt in re, 2 Swab. & Trist. 494. In this case, it would seem the testator made a formal execution of the first draft, which was doubtless intended to be provisional in some respects, and to be superseded by the execution of the engrossed will soon after.

[50] Re Stracey, 1 Deane & Swab. 6; 1 Jur. N. S. 1177.

provides, the probate must be delayed until the death of both.[51] The same point was so decided in Day, ex parte.[52] And it is here said, that such an instrument, though * irrevocable as a compact, is revocable as a will, by any subsequent valid testamentary paper.

25. It is settled in the courts of chancery, by a great number of decisions, that mutual wills, duly executed, become irrevocable, in equity, after the death of either party.[53]

SECTION II.

NUNCUPATIVE WILLS.

1. This privilege in regard to executing wills is restricted mainly to soldiers and mariners.
2. The history and rules of law applicable to such cases found in Prince *v.* Hazelton.
3. Not required, in the earliest periods, to be made in extremis.
4. The earliest English law-writers require them to be so executed.
5. The rule as declared by Swinburne requires this; but his argument not.
6. The law so defined by Chancellor Kent and other writers.
7. Under statute of frauds this kind of will seldom made, except in extreme cases.
8. Blackstone and Chitty affirm that the legal requisites must be strictly fulfilled.
9. The requirements are substantially the same as in gifts mortis causa.
10. In the American states this kind of will is now greatly restricted.
11. Instructions for drawing a will not a good nuncupative will.
12. Not applicable to sickness of chronic character, except at the very last.
13. Soldiers and seamen can only make such wills in extremis.
14. In case of soldiers and seamen they need not call the witnesses in form.
15. Soldiers must be upon an expedition, and seamen at sea.
16. The term seamen, or mariner, applies to all kinds of navigation, to all engaged.
17. And if made during the voyage, but in harbor, it is sufficient.
18. The formalities of execution are sometimes dispensed with among soldiers.
19. The form of the will is not material. Capacity, purpose, and condition is all.

[51] Re Raine, 1 Swab. & Trist. 144; 1 Jarman, ed. 1861, 13; Lovegrove in re, 8 Jur. N. S. 842.

[52] 1 Bradf. Sur. Rep. 476. But in a recent case in Ohio, Wather *v.* Wather, 14 Ohio N. S. 157, it was held that a joint will is unknown to the testamentary law of the state, and inconsistent with the policy of its legislation. And such a will made by husband and wife, treating the separate property of each as a joint fund, was held not admissible to probate, either as a joint or several will, although some of the provisions were several, — such an instrument partaking of the nature of a compact, in which each provision is influenced by all the rest; so that all must stand or fall together.

* [53] Lord Walpole *v.* Lord Orford, 3 Vesey, 402; s. c. 7 T. R. 138; Hinckley *v.* Simmons, 4 Vesey, 160; Izard *v.* Middleton, 1 Dessaus. Ch. 116.

20. By statute of frauds nuncupative will cannot supersede written one, but may dispose of lapsed legacies.
21. Domat declares all merely nuncupative wills, too loose and liable to frauds.
22. Upon principle, soldiers' and mariners' wills may be proved by one witness.
23. The analogies might seem to require more, but the necessities of the case will not allow it.
* 24. The rule maintained by the New York courts. Opinion of Judge Bradford.
25. Statement of the most definite form of which the question is susceptible.
n. 39. Report of the remarkable case of Cole *v.* Mordaunt.
n. 40. The case of Prince *v.* Hazelton similar in many respects.
26. Restrictions in America. One who is a passenger, not within the exception as to seamen.
27. But a mariner at sea may make a nuncupative will, at the request of another.
28. Will not extend to lands. Strict construction applied to all such instruments.
29. Not good if made at request of party to be benefited.
30. American states seem to require proof of the rogatio testium.
31. The very words of the testator should also be proved.
n. 43. Cases bearing upon the validity of nuncupative wills.

17 *a.* 1. It seems scarcely necessary, at the present day, to occupy much time, or space, upon the subject of nuncupative wills, in a treatise intended for practical use, since by the late English statute,[1] and by the statutes of many of the American states, the privilege of making such wills is restricted to soldiers in actual military service, and mariners at sea,[2] who are allowed to dispose of personal estate, including wages due them, in the same manner they might have done before the statute.

2. But the fact that the privilege still exists, although restricted within these narrow limits, will render desirable, perhaps, a brief exposition of the history of, and principles of law applicable to, this class of testaments. This subject came before the Court of Errors in New York, at an early day, in a case[3] affecting a large property, and under such a state of facts as to enlist the ablest counsel in the state, and occupied the court for many days in the hearing, and is most exhaustively discussed by Chancellor *Kent*, and by Mr. Justice *Woodworth*. These opinions contain the substance of all the learning upon the subject of nuncupative wills, from the earliest days to that date, and very little has occurred since, which could add much to the very full discussion which the subject there receives.

* 3. It seems to be conceded, by all writers upon the subject, that

[1] 1 Vict. ch. 26.

[2] General Statutes, Mass., ch. 92, sec. 9; 2 N. Y. Rev. Stat. 60, § 22.

[3] Prince *v.* Hazleton, 20 Johns. 501.

in the earlier periods of the history of wills, they must all have been made much in the manner nuncupative wills are now allowed to be made. And it seems very probable, from the nature of the case, that in regard to wills made in that early day, before the discovery of writing, or when the knowledge of the art was confined to a small number of persons, comparatively, that most testaments would have been made as a kind of parting declaration, or dying testimony of the testator, in regard to the disposition of his estate. And it does not seem to be considered, by writers upon the subject, that nuncupative wills were in the first place required to be made during the last sickness.

4. But the earliest English writers upon this subject, thus defined them, as being such wills as are made when the testator "lyeth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declareth by word, what his will is."[4] But Chancellor *Kent*, adds to this passage: "I do not infer, from these passages, that unwritten wills were always bad, at common law, unless made in case of extremity, when death was just overtaking the testator."

5. But it seems to be well settled, that from before the period of Henry VIII. the law had become established in England, that such wills, to be of any avail, must be made in the last extremity, when the testator did not expect to recover, and had not time to make a more deliberate will, or a will in writing. For, although Swinburne[5] assigns for reason, why nuncupative wills were not commonly made, while the testator was in health, that * "it is received for an opinion amongst the ruder and more ignorant people, that if a man should chance to be so wise as to make his will, in his good health, when he is strong and of good memory," &c., "that then surely he would not live long after," he declares, that such wills are only allowed to be made when the testator is in great extremity.

6. "This," says Chancellor *Kent*,[6] "has been the uniform language of the English law-writers, from that time down to this day, so that it has become the acknowledged doctrine, that a nuncupa-

* [4] Perkins, sec. 476, in the time of Henry 8; Swinb. pt. 1, § 12, where it is said, "this kind of testament is made commonly, when the testator is now very sick, weak, and past all hope of recovery."

[5] Pt. 1, sec. 12, pl. 4.

* [6] 20 Johns. 510.

tive will is only to be tolerated, when made in extremis." And in Bacon's Abridgment,[7] nuncupative wills are thus defined, such as are made "by word, or without writing, which is where a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he staid the writing of his testament, desires his neighbors and friends to bear witness of his last will, and then declares the same presently, by word, before them." "And this being after his death proved by witnesses, and put in writing by the Ordinary, is of as great force for any other thing but land, as when at the first, in the life of the testator, it is put in writing."

7. By the statute of frauds,[8] this privilege of making nuncupative wills, in extremis, is still further restricted, the provisions of which we have here given at length,[9] since they have * been reënacted

[7] 7 Vol. tit. Wills and Testaments, D, p. 305; 1 Inst. iii.; Wood, pt. 1, 787.

[8] 29 Car. II.

[9] The statute of 29 Car. II. ch. 3, §§ 19, 20, 21, 22, 23, thus enacts: By § 19, for the prevention of fraudulent practices, it is enacted: "1. That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, or to that effect." And by stat. 4 Anne, ch. 16, §14, it is declared: That all such witnesses as are and ought to be allowed to be good witnesses upon trial at law, by the laws and custom of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto.

"Nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his, her, or their habitation, or dwelling, or where he or she has been resident for ten days or more, next before the time of making such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

"§ 20. That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

"§ 21. That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least, after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or the next of kindred to the deceased, to the end they may contest the same, if they please.

"§ 22. That no will in writing, concerning any goods or chattels, or personal estate, shall be repealed: nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done, by three witnesses at the least.

in most of the American states, and in many of them that class of wills is never allowed, except to soldiers, and mariners, as before stated. And Sir *William Blackstone*[10] after * rehearsing the provisions of the statute of frauds in regard to this class of wills, concludes: "Thus hath the legislature provided against any frauds, in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised, by sudden and violent sickness."

8. The provisions of the statute in regard to nuncupative wills have been strictly enforced by the courts, and they have generally adopted a rigid and strict construction in regard to them. It must appear, that all the requirements of the law have been fully complied with, such as the rogatio testium, or calling upon the witnesses to bear testimony of the act.[11] Mr. Chitty, in his note[12] says, that independent of the statute of frauds, the factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. The testamentary capacity, and the animus testandi, at the time of the alleged nuncupation, must appear, by the clearest and most indisputable testimony, and that the proof embodies the *real* testamentary intentions of the deceased.[13]

9. It will thus appear, that both under the regulations of the

"§ 23. Provided, that any soldier in actual military service, or any mariner, or seaman being at sea, may dispose of his movables, wages, and personal estates, as before the making of this act."

[10] 2 Comm. 500, 501. This learned writer thus enumerates the requisites for a valid nuncupative will. "The testamentary words must be spoken with an intent to bequeath, not any loose, idle discourse in his illness; for he must require the bystanders to bear witness of such his intention; the will must be made at home, or among his family or friends, unless by unavoidable accidents; to prevent impositions from strangers; it must be in his *last* sickness; for if he recover, he may alter his dispositions, and has time to make a written will: It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses, nor yet too hastily and * without notice, lest the family of the testator should be put to inconvenience, or surprised."

[11] Bennett *v.* Jackson, 2 Phillim. 191; Parsons *v.* Miller, id. 195.

[12] 2 Bl. Comm. 501.

[13] Lemann *v.* Bonsall, 1 Add. 389. And as the words of the statute are, that every such will, that "is not proved by the *oath of three witnesses*," shall be invalid, it has been held, that if one of the three witnesses present at the making of the will dies before the proof, the will must fail. Phillips *v.* St. Clements Danes, 1 Eq. Cas. Ab. 404; Lucas *v.* Goff, 33 Miss. 629.

statute of frauds, and at common law, the requirements, in regard to the time and mode of executing nuncupative wills, are substantially the same, as in regard to gifts, mortis causa.[14] The * only material distinction between the two modes of disposing of personal estate consists, in the latter requiring a substantial and continued change of possession, which is not required in regard to the former.[14] The provisions of the statute of frauds do not extend to wills of soldiers and seamen.

10. It is not important to go much into the detail of the statutory provisions of the different states. Mr. Perkins has given an extended synopsis of their different provisions in his notes to Jarman.[15] In some of the states it has been held, that even real estate might pass by nuncupative will.[16] In the State of Pennsylvania such wills are allowed, but are placed under restrictions, similar to those of the statute of frauds.[17]

11. In many of the states where the question has arisen, it has been held, that instructions for the drawing up of a written will, declared before the requisite number of witnesses, may be received and proved in the court of probate, as a nuncupative will, where the testator is by the act of God rendered incapable of completing his will in the mode contemplated by him.[18] But this has been denied in some cases, and, as it seems to us, with the greater show of reason and authority, since the very definition of a nuncupative will, in all recent times is, that it be made * by the testator when he is in extremis, and so conscious of the fact, that he apprehends he has not time sufficient to make a will in writing, and that he must declare his will in the present tense, animo testandi, with a view to

[14] Post, pt. 2, § 42.

[15] 1 Jarman, 135, 136, 137.

[16] Gillis *v.* Weller, 10 Ohio, 462, under statute of 1824. But by statute, 1831, nuncupative wills are restricted to personal estate.

[17] Werkheiser *v.* Werkheiser, 6 W. & S. 184; Porter's Appeal, 10 Penn. St., 254; Haus *v.* Palmer, 24 Penn. St. 296.

[18] Mason *v.* Dunman, 1 Munf. 456; Offutt *v.* Offutt, 3 B. Monr. 162; Boofter *v.* Rogers, 9 Gill, 44; Freirson *v.* Beall, 7 Ga. 438; Parkison *v.* Parkison, 12 Sm. & M. 673; Aurand *v.* Wilt, 9 Barr, 54; Striker *v.* Groves, 5 Wharton, 397. But where the testator did not intend to make a nuncupative will, and there was time to make a written one, it was held not a good nuncupative will. Porter's Appeal, 10 Penn. St., 254. But in a similar case, where there was not time to complete the written will, it was held a good nuncupative will. Phoebe *v.* Boggess, 1 Grattan, 129. An instrument founded upon a consideration can not be set up as a will. Phillips *v.* Chappel, 16 Ga. 16.

have the very words he then utters constitute his will, and without any purpose of further revision.[19] We conclude, therefore, that the rule of the ecclesiastical courts, by which instructions for preparing a written will of personalty have been admitted to probate, as a will, where the testator, by the act of God, was rendered unable to complete the execution, has no proper application to nuncupative wills.[20]

12. Hence it has been declared, by high authority,[21] that if nuncupative wills can be permitted at all, in the case of chronic disorders, it is only in the very last stage and extremity of them.

13. It is left undetermined, in Hubbard *v.* Hubbard,[20] whether this requirement in regard to nuncupative wills, namely, that they be made when the testator is conscious of the near approach of death, is applicable to the wills of soldiers and seamen; but it has been claimed, that as this requirement existed long before the statute of frauds, it must be regarded as applicable to * such cases, since by the express terms of that statute,[22] those classes of persons are allowed to dispose of their personal effects, "as before the making of this act." But the decided cases do not all seem to conform to this view.

14. And it has been held, that in the making of the will of a seaman or soldier, by nuncupation, it is not requisite that the testator should have made a formal call upon the witnesses to take notice of his will, what is called the rogatio testium.[20]

15. The privilege extended to soldiers being limited to such as are "in actual military service," questions have sometimes arisen

[19] Dockum *v.* Robinson, 6 Foster (N. H.), 372; Winn *v.* Bob, 3 Leigh, 140; Reese, *v.* Hawthorn, 10 Grattan, 548.

[20] Hubbard *v.* Hubbard, 4 Selden, 196. See also, Taylor *v.* D'Egville, 3 Hagg. 202; Bragge *v.* Dyer, id. 207; The King's Proctor *v.* Daines, id. 218.

[21] *Kent*, Chancellor, in 20 Johns. 514. It is here argued, that in chronic diseases a man cannot be said to be in his last sickness until the near approach of the fatal crisis. But it seems to us, that, as the subjects of such diseases are for the most part wholly unconscious of the certainty of any fatal termination of the malady until near the close of life, it may, with more propriety, be said that they are not in any such conscious nearness of death, as to be, what the law terms, in extremis, wherein the near view of death gives great weight and solemnity to the few words a man may have strength to utter, and which therefore renders it proper he be allowed to make such a will only at such a time. But a nuncupative will, pronounced by the testator two days before his death, was held good to pass property amounting to more than $3,000. Brayfield *v.* Brayfield, 3 H. & J. 208.

[22] 29 Car. II., ch. 3, § 23.

as to what is implied by these terms. The rule of the English ecclesiastical courts is, that it was intended to include only such as are on an expedition, or in the language of the Roman law, in expeditione."[23] Hence it has been there decided, that the will of a soldier quartered in barracks, either at home,[24] or in the Colonies,[25] is not within the concession. And the same rule was applied to an officer, while in command of one of the divisions of the army in the East Indies, and who died whilst on a tour of inspection of the troops.[26] So also, in the case of Lord Hugh Seymour, the commander-in-chief of the naval force at Jamaica, but who lived on shore, at the official residence, with his family,[27] it was held, that he did not come within the exception of the statute, as he was not "at sea." But in a very recent case,[28] where the testator was about to proceed on an expedition, by order of the military authorities, against the King of Ashantee, and made his will in view of the expedition, it was admitted to probate as a nuncupative will, not being executed in the presence of two witnesses.[29] And a letter written by an invalided surgeon, on his return home, on board of the regular line of steamers, addressed to his brother, and containing a disposition of his property, he having deceased before he reached England, was admitted to probate, as the will of a seaman made at sea.[30] And it has been held, that the exception applies to seamen who are in port, and obtaining leave to go on shore, by accident, are so seriously injured, as not to be able to return on shipboard, and die on shore within a few days.[31]

*16. The term mariner, or seaman, includes the whole naval force and service, applying to all the officers and sailors, while at sea, or temporarily absent on leave, and also to the merchant service.[32] This subject is very learnedly discussed by the surrogate in

[23] 1 Wms. Exrs. 102. post n. 30.

[24] Drummond *v.* Parish, 3 Curteis, 522.

[25] White *v.* Repton, 3 Curt. 818; Phipps in re, 2 Curt. 368; Johnson in re, id 341.

[26] Hill in re, 1 Robertson, 276.

[27] The Earl of Euston *v.* Seymour, in 2 Curteis, 339; 3 Curteis, 530.

[28] Thome in re, 11 Jur. N. S. 569.

[29] Ante § 17, n. 45.

[30] Saunders in re, 11 Jur. N. S. 1827.

[31] In the goods of Lay, 2 Curt. 375. This was distinguished from the case of Lord Seymour, who lived on shore, only visiting his ship occasionally, but the seaman's home was on shipboard, and he died on land, by mere accident.

[32] Morrell *v.* Morrell, 1 Hagg. 51; In the Goods of Milligan, 2 Robert. 108.

a recent case in New York.[33] It is here held, that the statute applied to the cook on board a steam-ship, who made a nuncupative will in favor of his mother, while lying sick on board the vessel at her wharf in Bremen, he being considered as a mariner, or seaman, at sea. The concession is not limited to any special occupation on shipboard, but a purser, or any other person, whose particular vocation does not relate to the sailing of the vessel, possesses the same right as the sailor.[34]

17. In Hubbard *v.* Hubbard,[35] it was held by the New York Court of Appeals, that a nuncupative will may be made by the captain of a coasting vessel, while she is on a voyage, and while lying at anchor in an arm of the sea, where the tide ebbs and flows. And in regard to the form of the declaration, it is sufficient that the testator, in prospect of death, in answer to questions as to what disposition he desires to make of his property, states his wishes.

18. By the Civil Law, the ordinary formalities of executing nuncupative wills were dispensed with in favor of soldiers, and their wills were held valid, although they should neither call the * legal number of witnesses, nor observe any other of the ordinary solemnities in the execution of such instruments.[36] And the same indulgence is held by Swinburne applicable to soldiers,[37] in England.

19. It seems to be agreed on all hands, that the form of a nuncupative will is wholly immaterial, provided only that it be intelligible, and the testamentary capacity and condition, as well as purpose, be all fully and clearly established.[38]

20. The statute of frauds restricted the operation of nuncupative wills to those cases where no written wills existed. But under this provision of the statute, it was held, that the testator who had a written will, might dispose of any legacies which had lapsed, by way of nuncupation. Hence a codicil, disposing of the residue of the

[33] Thompson ex parte, 4 Bradf. Sur. Rep. 154. The learned judge here traces the history of military testaments back to the time of Julius Cæsar, who conceded the right to all soldiers, but by Justinian, it was restricted to such, qui in expeditionibus occupati sunt. Cod. Lib. 6, tit. 21. § 17; Inst. Lib. 2, tit. 11. The learned judge here states the rule, "that there must be actual warfare, and the soldier be engaged in expeditione, citing numerous cases in the ecclesiastical reports.

[34] In the goods of Hayes, 2 Curteis, 338.

[35] 4 Selden, 196.

[36] Inst. Lib. 2, tit. 11.

[37] Wills, pt. 1, § 14, pl. 4.

[38] Mr. Justice *Mason*, in Hubbard *v.* Hubbard, 4 Selden, 196; 1 Rob. on Wills, 147; Swinb. pt. 1, § 12, pl. 6; pt. 4, § 26, pl. 2.

testator's estate, by way of nuncupation, the residuary legatee named in the testator's written will having deceased, was upheld as valid.[39] And it was here held, that if any part of the will was obtained by fraud, it was so entirely void, that although formally reduced to writing, it was no part of the will, and formed no impediment to the testator disposing of that portion of his estate by way of nuncupation.[39]

21. The rules for the execution of military testaments seem to have been left entirely indefinite, in the Roman Civil Law, and equally so in the law of modern France.[40] This careful writer professes himself wholly at a loss, whether to adopt the rules of the Civil Law, as existing to their full extent in France, but concludes that the rule of the Civil Law, that whatever a soldier shall write with his sword upon the sand shall be a * valid will, could not be regarded as of binding force in modern France. This writer suggests that there is such temptation to fraud, in regard to merely nuncupative testaments, that they ought not to be upheld, unless reduced to writing, at the time of being made, by the testator or some other one, and ratified by him, which hardly comes within the definition of a strictly nuncupative will.

22. This writer[40] is equally uncertain in regard to the number of witnesses to be required in the case of a nuncupative will made by soldiers in expeditione, whether the full number necessary in other testaments shall be required here, which is seven, or whether five shall not be held sufficient, or even two, which is the lowest amount of proof admitted in the Civil Law, as one witness is in the common law. This writer finally adopts the view, that two witnesses are sufficient to establish a military testament; which, if the same rule were to prevail with us, we must, to follow out the analogy by our practice, one witness being sufficient in the most important cases, allow of such wills being proved by one witness.

23. But some have argued, that as the statute of frauds required the same number of witnesses for nuncupative, as for other wills, it was but reasonable that nuncupative wills should be proved by the same number of witnesses that other wills are required to be proved by. But where there is no statutory provision applicable to the point of the number of witnesses, in case of nuncupative wills, and the statute expressly recognizes the right of soldiers and seamen to

[39] Stonywel's Case, Th. Ray, 334.

[40] 2 Domat, 296, pt. 2, bk. 3, tit. 1, sec. 3, no 3069 et seq.

so execute their wills, it might admit of some question, whether the courts ought in all cases to require the same number of witnesses, as in the case of written wills; and since the concession, to this class of persons, of the privilege of making wills, in this form, is purely from the necessity of the case, the principle of the thing might seem to require that no specific rules should be prescribed, as to the form or mode of proof, except that it satisfy the conscience of the court. This, we think, is the true rule.

* 24. In the case of Ex parte Thompson,[41] the will of a seaman

[41] 4 Bradf. Sur. Rep. 154, 156. As this opinion contains the fullest and ablest exposition of the law upon this subject to be found in any recent case, and may not be ready of access in some places; and especially as the present period is likely to give greater importance to this species of testament, we have given it at length: "The only nuncupative wills now allowed, are those made by soldiers and sailors. It appears from the preface to the life of Sir Leoline Jenkins, that he claimed the merit, at the time of the preparation of the statute of frauds, of having obtained for the soldiers of the English army, the full benefit of the testamentary privileges of the Roman army. The Roman soldier was indulged with very peculiar rights and immunities, in the way of exemption from the usual rules in respect to wills. Inter arma silent leges — in the camp and on the battle-field the testamentary law was silent. Amid the excitement and the perils of warfare, the forms prescribed by law for the execution of a will, were dispensed with, so that the soldier might declare his last wishes by word of mouth; or if, wounded, he wrote with his blood on his shield, or with his sword in the dust, the disposition was held firm and sacred. This privilege was unknown in the republic, but when the civil and military authority were united in one person, and the army became the controlling power of the state, under Julius Cæsar, that celebrated commander authorized the making of the military testament, in any mode, and without prescribed ceremonials. The example thus set, was subsequently followed by Titus, Domitian, Nerva, and Trajan, until the usage became thoroughly established. (Dig. lib. 29, tit. 1, § 1.) It was extended also to the naval service; and officers, rowers, and sailors, were in this respect esteemed as soldiers. (Dig. lib. 37, tit. 12, § 1.)

. . . "This was the foundation of those privileges of soldiers, in regard to nuncupative wills, which were allowed wherever the civil law prevailed, and which have been very generally adopted among civilized nations. (Domat, pt. 2, bk. iii. tit. 1, § 1, 3, John Voet, Com. Pand. lib. 29, tit. 1; Duranton, Tom. 9, liv. 3, tit. 2; Toullier, Tom. 5, liv. 3, tit. 2.) In France, the Ordonnance de la Marine of 1681, first gave special privileges to wills made at sea; and the ordinance of 1735, regulated the celebration of the military testament. The Code Civil has also adopted definite rules in regard to wills made at sea, in time of pestilence, or by soldiers in service. (Art. 981–8.) In Holland, when commerce began to be extended to distant voyages, the question arose, whether wills made at sea were entitled to any peculiar immunity; and some jurists affirmed that they should be taken as military testaments. The matter was finally resolved in favor of their exemption, in case of persons sailing to, or returning from, the * Indies, by the ordinances of the West

seems to have been established upon the testimony of one * witness, to whom the declaration was made by the decedent in favor of his India Company, in 1672 and 1675. (Voet, Com. Pand. lib. 29, tit. 1.) In England, by the statute of frauds, passed about the same time, the full benefit of the privilege was given, without restriction, to all soldiers and sailors in actual service; and, as I have already stated, this liberal rule has continued to the present day.

"Nuncupative wills not being regulated by statute, as to their mode of celebration or execution, the single question for the judgment of the court, is, whether the nuncupation was made by a person entitled to that privilege. The restrictions of the statute of frauds were not applied to wills made by 'any soldier being in actual military service, or any mariner or seaman being at sea.' By the Revised Statutes of New York, it was provided, that nuncupative wills should not be valid, 'unless made by a soldier, while in actual military service, or by a mariner, while at sea.' (2 R. S. p. 60, § 22.) The terms of the exception in the statute, 1 Vict. ch. 26, are, 'any soldier being in actual military service, or any mariner or seaman being at sea.' The phraseology is slightly different in these statutes, but the rule is substantially the same in all, — that the nuncupation is only valid, when made by a soldier in actual military service, or by a mariner at sea, at the time of the testamentary act. It is not enough to be a soldier or a sailor, but there must be actual service. The military testament was first conceded by Julius Cæsar to all soldiers, but it was subsequently limited by Justinian to those engaged in an expedition, solis qui in expeditionibus occupati sunt. (Code, lib. 6, tit. 21, § 17; Inst. lib. 2, tit. xi.) The exception was borrowed with the rule from the civil law, and the courts have invariably adhered to the principle, that there must be actual warfare, and the soldier be engaged in expeditione. (The Goods of Johnson, 2 Curteis, 341; Re Phipps, ib. 368; Re Churchill, 4 Notes of Cases, 47; Merlin, Test. sec. 2, § 3, art. 5, art. viii.; White *v.* Repton, 3 Curteis, 818; Drummond *v.* Parish, ib. 522; The Goods of Perry, 4 Notes of Cases, 402; The Goods of Norris, 3 Notes of Cases, 197; The Goods of Tell, 1 Robertson, 276; 4 Burge, Com. 394, Cujac Consult, 49.) So, also, the nuncupation of a mariner to be valid must be made at sea. (Key *v.* Jordan, in 3 Curteis, 522.) It is sometimes difficult to determine when the mariner is to be considered at sea. For example: Lord Hugh Seymour, the admiral of the station at Jamaica, made a codicil, by nuncupation, while staying at the house on shore appropriated to the admiral of the station. The codicil was rejected, on the ground that he only visited his ship occasionally, while his family establishment and place of abode were on land, at the official residence. (The Earl of Euston *v.* Lord Henry Seymour, in 2 Curteis, 339.) But where a mariner belonging to a vessel lying in the harbor of Buenos Ayres, met with an accident when on shore by leave, made a nuncupative will, and died there, probate was granted, for the reason that he was only casually absent from his ship. (In the Goods of Lay, 2 Curteis, 375.) The will of a ship-master, made off Otaheite, has also been allowed. (Re Thompson, 5 Notes of Cases, 596.) In the present instance, the decedent made a nuncupation, when the vessel, to which he was attached, was lying at the wharf, in Bremen. He was at the time in actual service, on ship-board, and the nature of the service was continuous — not being limited to the particular voyage. I think, therefore, he was entitled to the privilege. A question arises, however, as to the character of his calling. He was cook on board the steamship, and not

mother. The learned surrogate thus states the rule * of law upon this point: "As well because the wills of soldiers and mariners were excepted from the operation of the provisions of the statute of frauds, as for the reason and ground of the exception, and the peculiar character of the military testament, it was never held requisite that those nuncupations should be made during the last sickness. Nor has any particular mode been prescribed in respect to the manner of making the testament. The very essence of the privilege consists in the absence of all ceremonies, as legal requisites, or as Merlin states the * proposition: 'The form was properly to have no form.' It is true the Roman law required two witnesses. This, however, did not relate to the essence of the act, but only to the proof. In respect to evidence, we do not follow the Civil or the Canon Law. No particular number of witnesses is requisite to verify an act judicially, and all the court demands is, to be satisfied by sufficient evidence, as to the substance of the last testamentary request, or declaration of the deceased. This ascertained, the law holds it sacred, and carries it into effect, with as much favor and regard, as would be paid to the most formal instrument, executed with every legal solemnity."

25. We have thus given the substance of all the important provisions of the English and American law, affecting the question of nuncupative wills, and in a form the most reliable in our power. It is a significant fact, that the stringent provisions of the statute of frauds, upon this subject, are supposed to have originated from the

what is ordinarily understood as a mariner. The principle upon which the privilege of nuncupation is conceded, applies to all persons engaged in the marine service, whatever may be their special duty or occupation on the vessel. As, in the army, the term 'soldier' embraces every grade, from the private to the highest officer, and includes the gunner, the surgeon, or the general. (In the Goods of Donaldson, 2 Curteis, 386; Shearman *v.* Pyke, in 3 Curteis, 539; Re Prendegast, 5 Notes of Cases, 92; Merlin, Test. sec. 2, § 3, arts. v. viii.) So in the marine, the term 'mariner' applies to every person in the naval or mercantile service, from the common seaman to the captain or admiral. It is not limited or restricted to any special occupation on shipboard, but a purser, or any other person whose particular vocation does not relate to the sailing of the vessel, possesses the same right as the sailor. (Morrell *v.* Morrell, 1 Hagg. 51; In the Goods of Richard Hayes, 2 Curteis, 338.) A cook is certainly as much a necessary part of the effective service of a vessel as the purser or the sailor, and there would seem to be no reason why he should be excluded from the advantage of a rule, designed for the benefit of men engaged in the marine, without reference to the particular branch of duty performed in the vessel."

circumstance of a gross fraud attempted the year before the enactment of that statute, in setting up a fictitious nuncupative will.[42] If any one feels that there is a * want of precision in the rules which we have laid down for the making of nuncupative wills, by soldiers and seamen, we can only say that we have made them as specific as the nature of the case would allow, so far as these two classes of persons are concerned; and as to all others, the right to make wills in this form, and the mode of doing it, was sufficiently defined in the English statute of frauds, and similar provisions exist in most of the American states, where the right of making nuncupative wills is not restricted to soldiers and seamen.[43]

26. There are a considerable number of cases in the American reports bearing upon this subject, most of which will be found carefully digested in Mr. Fish's note.[44] Most of the American states have first followed the statute of frauds in regard to the formalities required in the execution and proof of nuncupative wills; and some have, subsequently, restricted them to seamen and soldiers, who seem to be the only persons who really require such an indulgence. It was held in Warren *v.* Harding,[45] that a man who is a

[42] Cole *v.* Mordaunt, 4 Vesey, 196, in note. That case was this, and is here said to be "a remarkable case:" "Mr. Cole, at a very advanced age, married a young woman; who, during his life, did not conduct herself with propriety. After his death she set up a nuncupative, will, said to be made in extremis, by which the whole estate was given to her, in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the Delegates, from the sentence of the Prerogative Court, in favor of the written will, Mrs. Cole offered to go to a trial at law, in a feigned action; submitting to be bound by the result. Upon the trial, at the bar of the court of King's Bench, it appeared, that most of the witnesses for the nuncupation were perjured; and that Mrs. Cole was guilty of subornation. After that, she applied for a Commission of Review; which was refused; and upon that occasion, Lord Nottingham said: 'I hope to see one day, a law, that no written will should be revoked, but by writing,' which desire was fulfilled the next year, by the provisions of the statute of frauds."

[43] The case of Prince *v.* Hazleton, 20 Johns. 502, is somewhat similar to that of Cole *v.* Mordaunt, supra, and the principles involved in the entire subject, here received a thorough review. It was the case of a nuncupative will of a large estate, alleged to have been made by the deceased, at a boarding-house, in favor of one who had been his nurse, and whom he had known but a short time; and it was held a fraudulent pretence of the witnesses.

[44] 1 Wms. Exrs. 104.

[45] 2 Rhode Island, 133. The testator was on his way to take command of a lighter, and not to act as a mariner at sea.

mariner by profession, but a passenger at the time of making his will, was not within the exception in the statute in favor of seamen.

27. And where the testator was a mariner at sea, in his last sickness, and within an hour of his death, being inquired of as to what disposition he wished to make of his property, replied, "I want my wife to have all my personal property," the declaration being made in the presence of four witnesses, and the * testator being of sound mind, and under no restraint, it was held a good nuncupative will.[46]

* [46] Hubbard *v.* Hubbard, 12 Barb. 148. It seems always to have been regarded as essential to the validity of ordinary nuncupative wills, in the English ecclesiastical courts, as before intimated, that there should have been a distinct calling of the witnesses to take notice of the testator's declarations of a will, and that the testator make the declarations, animo, testandi, with a view, to have the very words then uttered by him constitute his will. Bennett *v.* Jackson, 2 Phillim. 190. See also, Winn. *v.* Bob, 3 Leigh (Va.) 140. But in some of the states, although requiring greater strictness of proof than in regard to written ones, Woods *v.* Ridley, 5 Cushman, 119, it has not been required that the declarations of the testator should have been made exclusively for the purpose of creating a will in the present tense. Calling witnesses to the bedside of the testator, to hear his declarations to the person requested to prepare his will, will constitute a good nuncupative will, where the testator is unable to execute his contemplated will. Burch *v.* Stovall, 5 Cush. 725. And in Gibson *v.* Gibson, Walker, 364, in the same state, it was held, that two witnesses must be present when a nuncupative will is executed, and the person making the same must do it, animo testandi, that is, must himself understand that he is making his will. And in Tennessee, where the two witnesses testified that the testator called upon them, and said: "I wish to make a disposition of my effects," and then went on to declare the nuncupation; and the witnesses, though not called upon in the words of the statute, felt specially required to notice the factum of the will, and the deceased supposed himself to be performing the testamentary act, it was held a good nuncupative will. Barker *v.* Dodson, 4 Humph. 342. The two witnesses required by statute, to the execution of the will, must both hear the same declaration, and it is not sufficient, that each heard different declarations at different times. Tally *v.* Butterworth, 10 Yerger, 501. And where the testator was asked, a few hours before his death, what disposition he would make of his estate, and replied, "all to my wife that's agreed upon," and looking to his father, who replied, "yes, yes," and then to his wife, said, "you see my father acknowledges it," it was held a good nuncupative will. Parsons *v.* Parsons, 2 Greenl. 298. Where the two witnesses, required by statute to prove a nuncupative will, do not agree as regards the will, it is only established as far as they do agree. Portwood *v.* Hunter, 6 B. Mon. 538.

In a late English case, Parker in re, 2 Swab. & Trist. 375, where the master of a vessel, being at an intermediate port, wrote and forwarded by post a letter, of which some portion was testamentary, the vessel being subsequently lost at sea, it

* 28. In most, if not all, of the American states, lands cannot be disposed of by nuncupative will.[47] And in nearly all of them, it is believed, the privilege of disposing of estate by nuncupation is restricted within very narrow limits, and guarded, in its practical enforcement, by the most rigid construction.[48]

29. And where the words attempted to be set up as a nuncupative will, were drawn from the testator by the person whose interest it was to establish them as a will, and no witnesses were called upon by the testator to bear witness to his words, it was held not a good will.[49] This decision is governed by the statute of that State.

30. It seems to be regarded, in many of the American states, as indispensable that the testator should call upon witnesses to take notice of his declaration in order to constitute a valid nuncupative will.[50]

31. And the very words of the testator should be proved in order to establish the nuncupation. And when neither the words, nor their substance, is committed to writing by any one, as proof of the bequest, or to be preserved as such; and no proof was made of a request by the testator to the bystanders to bear witness that the words were his will, — it was held that a nuncupative will could not be established.[51]

SECTION III.

REQUIREMENTS IN REGARD TO SIGNING WILL.

1. The different English statutes upon the subject.
2. Signing by mark, or by initials, or by fictitious name, sufficient.
3. And if the testator's hand is guided, by his consent, it is sufficient.
4. Parol evidence admissible to show that a will was executed by mistake.
5. Sealing a will not equivalent to signing.

was held, that he was a mariner at sea, and that such letter being in his handwriting, and testamentary, was entitled to probate.

[47] Palmer *v.* Palmer, 2 Dana, 390.

[48] Rankin *v.* Rankin, 9 Iredell, 156; Dorsey *v.* Sheppard, 12 Gill & J. 192; Haws *v.* Palmer, 9 Harris, 296; Yarnall's Will, 4 Rawle, 46.

[49] Brown *v.* Brown, 2 Murphy, 350.

[50] Arnett. *v.* Arnett., 27 Illinois, 247.

[51] Taylor's Appeal, 47 Penn. St. 31. It was here held, that letters written by one person to another, announcing the death of the testator, and, in a general way, the disposition of his estate, could not be received as evidence of a nuncupative will.

6. A power to be executed, by will under seal, requires the use of a seal.
7. Late English case of signature by stamp.
8. Testator's signature may be affixed by the hand of another, at his request.
9. Only one signature required, where there are different pieces of paper.
10. The signature may be in any part of the paper, if affixed as the final act.
11. This rule more commonly applied to olograph wills. Sometimes to others.
n. 21. Will not presumptively executed, as of the date of the codicil, in some cases.
12. Decision in Virginia, that the paper must, on its face, appear complete.
n. 27. Review of the cases, and the principle of the rule.
* 13. The later cases require no formal publication, unless by express statute.
14. In New York, that is required by statute, and the proof, either internal or external, must show the fact.
15. The attestation clause is presumptive evidence of due execution in that mode. But if that is defective, or the witnesses deny the facts, it may be established by proof aliunde.
16. Acknowledgment of signature, the same as making, in presence of the witnesses.
17. The English courts do not require the witnesses to know the paper is a will.
18, and n. 38. Review of cases showing that acknowledgment of the paper as a will is equivalent to signing.
19. Presence of witnesses, in case of a blind testator, sufficient, although he cannot see them.
20, and n. 40. Acknowledgment of the paper as testator's act, sufficient. Adding a mark no detriment.
21. In Ohio, the law requires acknowledgment, by testator; but this may be by acts.
22. Further review of English cases upon the point of testator declaring the paper to be his will.
23, and n. 43. Review of the cases and of the principle involved in this inquiry.
24, and n. 47. The mere draft of a will unexecuted, or imperfectly executed, can be of no avail.
25. The use of a seal dispensed with in most of the states, except in the execution of powers.
26. Some of the states require signature at the end, otherwise the place of signing unimportant.
27. Statute in regard to wills affects existing wills, unless specially excepted.
28. It is not important in what order the several acts of execution occur.
29. No particular form of words are requisite, either in acknowledgment or publication.
30. Misspelling of testator's name may indicate that he did not sign it.
31. Where a will is written according to testator's directions, not requisite he should know its contents before signing.
32. Not requisite the testator sign by the same name used in body of will.
33. Not essential in what order the names of the witnesses and testator appear.

§ 18. 1. A brief statement of the requirements of the different English statutes, in regard to the execution of wills, may enable us the more fully, and accurately, to comprehend and apply the decisions of the courts, at different periods, upon this subject.

* The statute of frauds[1] required that all devises, and bequests of any lands or tenements,[2] should be in writing, signed by the

[1] 29 Car. II. ch. 3.

[2] The word "hereditaments" is omitted in this clause of the statute, but found

testator, or by some other person in his presence, and by his express direction, and should be attested and subscribed in his presence by three or four credible witnesses. The more recent English statute[3] contains many of the same terms used in the statute of frauds, as "signature," "presence," "direction," "other person," "attested," "subscribed."[4] And bequests of personal estate, by the statute of Victoria, are assimilated very nearly to devises of real estate, so that many of the decisions of the ecclesiastical courts, since that statute came in force, in regard to personal estate bequeathed, become of considerable importance to be considered, although of no direct authority in regard to real estate.

2. Under the statute of frauds it was held, that the devisor of real estate might sign the devise by making his mark, and that it was not necessary to prove that he could not write his name at the time.[5] The court here considered the usage or practice of executing wills of real estate, by the devisor putting * his mark to the same, to be well established, and said it would be attended with serious embarrassment, and no adequate benefit, to allow the collateral inquiry, whether he could have written his name at the time. And it will not render this mode of signing insufficient, although the name of the devisor do not appear on the face of the will.[6] So signing by the initials of * the name is sufficient.[7] And it

in other portions of it. This and other inaccuracies in this important statute, which we should have expected to have been drawn with great care and circumspection, is commented upon by Lord *Alvanley*, in Buckeridge *v.* Ingram, 2 Ves. jr., 661, as being "extremely remarkable." See also, Doug. 244, n. 2.

[3] 1 Vict. ch. 26.

[4] See post, § 23. In Missouri, it is held, under the provisions of their statute, that the person affixing the name of the testator to his will, at his request, must also attest the will as a witness, and in his attestation embrace the statement of the mode of affixing the name of the testator. M'Gee *v.* Porter, 14 Mo. 611.

[5] Baker *v.* Dening, 8 Ad. & Ellis, 94; s. c. nom. Taylor *v.* Dening, 3 Nev. & P. 228. Evidence was given in this case, that the devisor, at the date of the will, could have written his name, and the court decided the case upon the assumption, that he might have written his name. Harrison *v.* Harrison. 8 Vesey, 185; Addy *v.* Grix, id. 504; 1 Hill, Ch. 266.

[6] Re Bryce, 2 Curteis, 325. In some of the American states, subscription by mark is held insufficient, unless it appear that the testator could not write, and it has been held insufficient, where one witness testified the testator could not write, and the subscribing witnesses testified that he acknowledged the instrument to be his last will and testament, after he made his mark upon it. Cavett's Appeal, 8 Watts & Serg. 21. And a mark, or signature, made by the hand of another,

[7] 1 Jarman, 73; Re Savory, 15 Jur. 1042.

has been held, that signing a fictitious, or assumed name, will be sufficient,[8] or where a wrong name was written against the mark.[9]

3. And where the testator is unable, from illness, to sign his will, and has his hand guided in making his mark, it is a sufficient signature within the statute of frauds.[10] The Vice-Chancellor here

will not constitute a valid execution, unless done in conformity to the requirements of the statute. Asay *v.* Hoover, 5 Penn. St. 21; Grabill *v.* Barr, 5 Penn. St. 441. In Pennsylvania, by statute, the will is required to be signed at the end thereof by the testator, as under the late English statute. Hays *v.* Hardin, 6 Penn. St. 409; Greenough, 11 Penn. St. 480.

And in New York it seems to be required, that it should appear that the testator is unable to write, in order to legalize the subscription of the instrument, on the part of the testator, by mark. Butler *v.* Benson, 1 Barb. 526. Subscription by mark is made sufficient, in Delaware, by statute. Smith *v.* Dolby, 4 Harring. 350.

But the general rule in the American states, undoubtedly is, that the testator may sign by his mark, and that where he does so, it will be presumed that he does it from necessity, either temporary or permanent. Upchureh *v.* Upchurch, 16, B. Monr. 102; Ray *v.* Hill, 3 Strobh. 297. The acknowledgment of his signature, or mark, in the presence of the witnesses, either apart or together, has been held equivalent to an actual exeeution in the presenee of the witnesses. Butler *v.* Benson, supra.

Where the statute of California provided that a will shall be signed by testator, or by some person in his presence, and by his direetion, the testator's name being written and his mark made by another person, with the coneurrenee of the testator, was held sufficient compliance with the statute. Flannery's Will, 24 Penn. St. 502. Execution of will by mark held sufficient in Missouri, whether the testator is able to write or not. St. Louis Hospital *v.* Williams' Adm'r, 19 Mo. 609. But if the name and mark are both affixed, it is not sufficient complianee with the statute, unless it appear that the name was affixed by direetion of the testator, in strict compliance with the statute. St. Louis Hospital *v.* Wegman, 21 Mo. 17. And even where the name was affixed to the will by the direction of the testator, and he made his mark in addition, it was held inoperative, as not being in compliance with the statute. Northeutt *v.* Northcutt, 20 Mo. 266.

[8] 1 Jarman, 73; Re Redding, 2 Rob. 339.

[9] Re Clark, 4 Jur. N. S. 243; 1 Jarman, 73.

[10] Wilson *v.* Beddard, 12 Simons, 28. In this ease the testator, before having his hand guided, to exeeute the paper, made some faint strokes upon eaeh of the sheets, whieh circumstanee was relied upon by Sir *L. Shadwell*, in his opinion, as evidenee of adoption and direction to aid him in affixing his signature. The hand of the testator may be guided by another, whenever he is physically unable to subscribe the will, without sueh assistanee, and it is not neeessary to prove any express request for sueh assistanee on bis part. Vandruff *v.* Rinehart, 29 Penn. St. 232. The following form of subscription is sufficient: "E. N. for R. D., at his request." Vernon *v.* Kirk, 30 Penn. St. 218; S. P. Abraham *v.* Wilkins, 17 Ark. 292. So also, where the testator's name was subscribed, at his request, by

said: "In order to constitute a direction, it is not necessary that any thing should be said. If a testator, in making his mark, is assisted by some other person, and acquiesces and adopts it, it is just the same as if he had made it without any assistance."

4. But the mere fact of executing a paper with due formality, does not necessarily constitute it the will of such person, or preclude the admission of parol evidence, that it was so * executed by mistake, and under a misapprehension, the person having mistaken it for some other paper.[11] As where two sisters, intending to execute their wills for the benefit of each other, after they were drawn up in form, each, by mistake executed the paper, intended for the will of the other, and it was held no valid execution of their wills, although perfectly intelligible, by way of conjecture and construction, without resort to extraneous evidence, assuming the parties to have been entirely sane; since it is scarcely supposable that such a contingency would ever occur, as two sisters sitting down, deliberately, to execute, each a will, on behalf of the other, and for her own benefit. But this not appearing in the will itself, it could not be incorporated into it, by way of conjecture, however obvious might be the ground of it.[12]

5. But it seems now almost universally conceded, that sealing merely, is not a good execution of a will, where the statute requires signing. It was said in some of the early cases, that "putting a seal to a will was a sufficient signing, within the statute of frauds and perjuries."[13] But in later cases, it was said, that "this was

one of the subscribing witnesses. Robins *v.* Coryell, 27 Barb. 556. But the mere fact that the testator's name is written by another, is not presumptive evidence that it was done at his request, and in his presence. Greenough *v.* Greenough, 11 Penn, St. 489.

[11] 1 Jarman (Eng. ed. 1861), 73. It is always a question of fact, to be settled by parol evidence, if controverted, whether the testator intended a duly executed paper-writing to operate as a will. English in re. 3 Sw. & Tr. 586; Norworthy in re. 11 Jur. N. S. 570.

[12] 1 Jarman, 73; Anon. 14 Jur. 402; Trimlestown *v.* D'Alton, 1 D. & Cl. 85. But it must not be supposed, that because a formally executed paper may be shown not to have been the paper intended, and thus defeated, as a will, that the evidence, and the execution, will have any effect to set up the paper, as a will, really intended to have been executed. It is well settled, that parol evidence is admissible to show, that all or a portion of a paper was not the will of the testator, being incorporated into the instrument by fraud and mistake, and a court of equity will decree that it be expunged. Hippesley *v.* Homer, Turner & Russell, 48, in n.; ante, § 17, pl. 21.

[13] Lemaine *v.* Stanley, 3 Lev. 1; 1 Freem. 538; Warneford *v.* Warneford, 2

very strange doctrine," because it opened such facilities for forging "any man's will;" [14] which is very true, *but the reason a very inconclusive one. The true reason is, undoubtedly, that signing and sealing are very different acts, by no means identical, or equivalent, and never so considered, and as the statute requires signing, the courts have no power to dispense with it, or to substitute something else for it, which they might regard as analogous, or very nearly the same thing. But the cases referred to, and others in the books, show that the most eminent equity judges doubted, in regard to the point, for a long time.[14]

6. Where, in a marriage settlement, a power is given to the wife to dispose of the estate so settled, by gift or devise, under her hand and seal, the use of this formality will be held indispensable, but a scroll or seal annexed to her name, although not recognized in the body of the instrument, will be a sufficient compliance with the requirements of the power.[15] But the proper mode of executing a will with a view to the execution of such power, is to recognize the seal in the body of the instrument, as an essential portion of its execution, notwithstanding the general law requires no such formality in order to its validity, since that formality is indispensable to the valid execution of the power, and will not, in any sense, expose the execution of the will to any hazard.

7. In a late English case, where the testator's name was affixed to the instrument by his direction and in his presence (by means of a stamp or engraving, which the testator, being paralyzed, had had made for his ordinary use), with a view to its execution as a codicil to his will, and the testator afterwards acknowledged both the signature and the codicil, the court declined to admit the paper to probate, on motion, saying, as the case differed from all the cases which, by the assistance of *the bar, they had been able to find, the party offering it for probate must propound the papers for proof in solemn form.[16]

Str. 764; Ellis *v.* Smith, 1 Ves. Jr. 12; Lee *v.* Libb, 1 Shower, 69, *Holt*, Ch. J. said, "the sealing is signing." See Smith *v.* Evans, 1 Wilson, 313; Wright *v.* Wakeford, 17 Vesey, 458.

[14] Lord Chief Baron *Parker*, in Smith *v.* Evans, 1, Wils. 313.

[15] Pollock *v.* Glassell, 2 Grattan, 439. And it is here held, that parol testimony is receivable to show that the seal was put upon the paper by the direction of the testator. In this state, a "scroll" is equivalent to a seal.

[16] Jenkyns in re, 9 Jur. N. S. 311. But on solemn argument and consideration,

8. Both the earlier and present English statute, and most of those in force in this country, allow the testator's signature to be made by some other person, if made in the presence of the testator and by his express direction. Under this clause of the statute, it has been held, this act may be done by one of the witnesses.[17] And it will not render the execution defective, where the person executing the will on behalf of the testator, by mistake, signs his own name instead of the testator's.[18] And where the person directed by the testator to sign for him, did it, by writing at the foot: "This will was read and approved by C. F. B., by C. C., in the presence of," &c., and then followed the signatures of the witnesses, it was held sufficient.[19] And where the will is thus executed on the part of the testator, it is not requisite, to the probate of the will, that more than one witness should be able to testify, from distinct recollection, that the testator gave express direction to have his name affixed to the instrument.[20] But where the statute requires, in express terms, that the testator's name, when affixed to the will by another, shall be so affixed by the express direction of the testator, it has been held that something more must be shown than the mere assent of the testator: and that his giving a silent assent to having his name so affixed, or even making his mark, will not be a sufficient compliance with the requirements of the statute.[21] But we should not regard the case of the testator adopting the signature, by making his mark, as coming within the provision of the

the execution by stamp was held sufficient, being equivalent to making a mark. Jenkyns *v.* Gaisford, 9 Jur. N. S. 630 (1863).

[17] Re Bailey, 1 Curteis, 914; Smith *v.* Harris, 1 Rob. 262. The New York statute requires witnesses to "sign" their names, but a witness who has written the testator's name, at his request, is required to "write his own name as a witness to the will," and it was held, that "the variance in the phraseology was not unimportant, and while the other witnesses might sign by mark, other persons writing their names, and even guiding their hands, while making their mark, it was indispensable that the witness, writing the name of the testator, should *write* his own name, as a witness." Meehan *v.* Rourke, 2 Bradf. Sur. Rep. 385. The testator's subscription may be written by another person in his presence and by his express direction, under the New York statute. Robins *v.* Coryell, 27 Barb. 556.

[18] Re Clark, 2 Curteis, 329. This seems a not infrequent occurrence. A similar case occurred in the county of Middlesex, in this Commonwealth, within the last few months.

[19] 1 Jarman, Eng. ed. 1861, 74; Re Blair, 6 No. Cas. 528.

[20] Greenough *v.* Greenough, 11 Penn. St. 489.

[21] Barr *v.* Graybill, 13 Penn. St. 396.

statute, requiring his name to be affixed by his express direction, but as a signature, by his own hand.

9. Only one signature is required, even when the will consists of more than one sheet, or piece of paper, where that is affixed with intent thereby to sign the whole instrument.[22] In a very late case[23] where the matter is fully considered, by one of * the most accomplished and learned judges of modern times, in regard to all matters affecting the law of the probate of wills, it was held, that when a will is found written on several sheets of paper, and the last only is signed and attested, prima facie the presumption is, that they were all in the room, and formed part of the will at the time of execution; that although some of the provisions in the third part of the will were not consistent with those in the first, yet as any one or two of the parts, without the rest, would be manifestly imperfect, and the reasons for supposing they were all attached together, at the time of execution, were so much stronger than any contrary presumption arising out of the inconsistency of some parts, they were all entitled to probate as the will of the testator.

[22] Winsor *v.* Pratt, 5 J. B. Moore, 484; s. c. 2 Br. & B. 650.

[23] Marsh *v.* Marsh, 6 Jur. N. S. 380, before Sir *C. Cresswell*, in the Court of Probate, in 1860. In the very late case of the Goods of West, 9 Jur. N. S. 1158 (1863), where there was not sufficient room remaining at the bottom of the fourth side of a sheet of letter paper upon which the will was written, for the signature, the attestation clause and the signatures of the testatrix and of the witnesses were upon a separate half sheet of paper, which was attached by three wafers, at the bottom of the second side or page of the will. One of the attesting witnesses had died, and the other could give no account of the state of the papers, at the time the testatrix signed her name. The counsel, who appeared for the probate, cited the cases of the Goods of Gausden, 8 Jur. N. S. 180; Cook *v.* Lambert, 9 Jur. N. S. 258. Sir *J. P. Wilde*, said: "In the cases cited, there was satisfactory evidence before the court, that the papers were in the same state at the death of the testator, as when the witnesses signed them. In the one before me, such evidence is entirely wanting. I must, therefore, reject the motion."

No such presumption of a codicil having reference to a prior will, there being two, attaches. In the case of Marsh *v.* Marsh, supra, the will of 1851 had been revoked by that of 1856, and the codicil of 1858 was found attached by tape to one corner of the will of 1851. It was held, that, in order that a will which has been revoked should be revived by a codicil, the latter must show an intention to do so, and that that intention must be extracted from the contents of the codicil itself, and cannot be established by an act of the testator dehors the instrument. Ib. The last point is based upon the requirements of the statute of Victoria, that a codicil to have the effect to revive a will, once revoked, either in whole or in part, must be executed in the manner prescribed by that statute, "and showing an intention to revive the same." 1 Vict. ch. 26, § 22.

* 10. By the statute of frauds, which merely required that the devise should be signed by the devisor, it was held not important in what portion of the instrument the name appeared.[24] The present English statute requires the name of the testator to be signed at the foot or end of the instrument. But under the former statute, it was necessary that the name of the devisor, in whatever part of the will it appeared, should either have been written, or adopted, by him, as the final act of execution.[25] And where the testator declares the paper to be his will, without signing his name at the end, it will be presumed he thereby intends to adopt his name, written in any other portion of the will, as the final act of signing.[26]

11. And although this rule has been more commonly applied to olograph wills, where the whole instrument being in the handwriting of the testator, there would seem more propriety in adopting the implication, that by writing his name, in any part of the instrument, with the purpose of signing, he thereby gave it the same degree of authenticity, as if he had made a formal signature under the testatum clause; yet the rule has been *sometimes extended to cases where the instrument was drawn up by another hand, under the testator's direction.[27]

*[24] Lemaine *v.* Stanley, 3 Lev. 1; s. c. 1 Freem. 538; Adams *v.* Field, 21 Vt. 256, where the subject is very thoroughly examined, both by counsel and the court, and the opinion of the court by *Bennett*, J., contains a very satisfactory analysis of the law upon this question.

[25] Right *v.* Price, Doug. 241; Griffin *v.* Griffin, 4 Vesey, 197 n.; Coles *v.* Trecothick, 9 Vesey, 249; Walker *v.* Walker, 1 Mer. 503.

[26] 1 Jarman, ed. 1861, 74. The case of Ellis *v.* Smith, 1 Ves. Jr. 11, is often cited, as if it were an authority for holding, that declaring a paper to be the will of the testator, in the presence of the witnesses, was equivalent to signing, and would dispense with that act altogether. But no such point is there decided, and that portion of the case is intended to go no further, than that, having signed the paper, it is not requisite that he should repeat that act in the presence of the witnesses, it being sufficient if he declare it to be his will in the presence of the witnesses, and require them to authenticate it as such. Adams *v.* Field, supra, and cases there referred to.

*[27] Sarah Miles's Will, 4 Dana, 1. We have not noticed any English case going this length, in regard to the signing required by the statute of frauds. Martin *v.* Watton, 1 Lee, 130, holds a will written by another, beginning with the name of the testatrix, and prepared for signature, and read over and approved by the testatrix, but which she had not strength to sign, but which was published and acknowledged, by her, as her will, in the presence of two witnesses, who attested it, as such, sufficient to pass personal property. But this was before the statute of 1 Vict. ch. 26, and while no testamentary act in writing was required to pass personal property, so that

12. In a late case, in the State of Virginia,[28] there is an apparent effort, on the part of the court, to rescue the law, in regard * to signing wills of real estate, from the apparent inconsistency into which it had fallen, by the English and American decisions, under the statute of frauds. By statute, in that state, a will written wholly by the testator, and signed by him, is good to pass real estate, without being executed before witnesses. It had been repeatedly decided there, that the signing of a will might be by the insertion of the testator's name, in any portion of the instrument, if done by him, as the final act of execution, or with the declared purpose of giving final authenticity to the will.[29] But in most of the cases

this case did not determine that the paper was signed, within the statute of frauds. But upon principle, we see no good reason why, if the testator may sign by the hand of another, and with a fictitious, or mistaken name, or mark, he should not be allowed to adopt the writing of this name, by another, as well as when written by himself, not for the purpose of authenticating the instrument, unless the express terms of the statute, requiring, that where the testator adopts the act of another, in regard to the signature of the devise, it shall be done "in his presence and by his express direction," is to be regarded as an obstacle. It is well known, that in regard to other sections of the statute of frauds, requiring a memorandum in writing, *signed* by the party to be charged, a printed bill, containing the names of the parties, has been held sufficient. Saunderson *v.* Jackson, 2 B. & P. 238; Schneider *v.* Norris, 2 M. & S. 286; Johnson *v.* Dodgson, 2 M. & W. 653. But it was very clearly held, that where the contract appeared imperfect, containing at the close the usual testatum clause, it could not be regarded as a perfected memorandum under the statute. Hubert *v.* Treherne, 3 Man. & G. 742.

And in Pennsylvania, where the statute in force required the will to be signed at the end, an instrument signed by the maker for his will, but containing after the signature an explanation of the reasons for making his will, but not signed by him, was held invalid. Hays *v.* Harden, 6 Penn. St. 409. And in Alabama, Armstrong *v.* Armstrong, 29 Ala. 538, it was held, that where the name of the testator was written in the beginning of the will, not by himself, but in his presence and by his direction, and acknowledged to the attesting witnesses, at the time they are called upon to attest the execution, it is as effectual as if written by his own hand.

[28] Waller *v.* Waller, 1 Grattan, 454.

* [29] Bailey *v.* Teackle, Wythe, 173; Selden *v.* Coalter, 2 Va. Cas. 553. The case of Waller *v.* Waller, supra, was very thoroughly discussed at the bar, and seems to have been very carefully considered by the court, and the result to which the court came in regard to olograph wills, where there could, in the nature of things, be no final act of execution until the signing; and especially, as in these cases, where it appeared, by the use of the usual concluding formulas, that the testator did intend, both to sign and publish the instrument before witnesses, the paper would, upon its face, appear to be incomplete; was that there could be no propriety in regarding it as a valid execution of a will. We think there can be no reasonable ground to question the soundness of this view. We regard the entire course of decisions, upon

in that state, and * in most of the English cases upon this point, perhaps all, there is upon the paper the attestation of the witnesses, which does show that the testator, by calling witnesses around him, and requiring them to attest the execution of his will, considered that he had done, on his part, the final act of execution. But in the case of Waller *v.* Waller, no witnesses being called, and the paper concluding, with the usual testatum clause, with the date,

this point, from the case of Lemaine *v.* Stanley, supra, which was almost contemporaneous with the statute, until the statute, 1 Vict. ch. 26, as having been, as it has often been characterized, a studied evasion of the just requirements of the statute. All the cases where the testator has failed to sign the will in the usual manner, at the foot or end of it, have been cases where the omission occurred accidentally, and not where the testator, had his attention been called to the subject, would not have signed. And the courts have exercised their ingenuity to meet these accidental cases of hardship, and at the same time preserve the fair integrity of the requirements of the statute. But in doing so, they have virtually said, signing is of no importance, where the will is an olograph, or the testator is shown to have known of its contents, and desired the witnesses to authenticate it as his will. But as the statute required "signing," the courts could not dispense with it, and must, therefore, find the thing most nearly resembling it, and call that the same. In Lemaine *v.* Stanley, it is declared that sealing is signing, and also that the writing the name at the beginning is signing. We think sealing comes nearer to signing than the use of the name at the beginning; for sealing is a final act * of authentication affixed, ordinarily, to a complete instrument. And as it is a mark of recognition of the paper, as the testator's will, it is not very easy to argue, that it is not as good as any other mark. But this view has been abandoned for a very long period, as too much of an evasion, sealing and signing being two distinct acts, very well understood, and very extensively practised, in the execution of instruments, and by no means the same act, or equivalent acts.

But to call the introduction of the name, on the face of an instrument, which is done to determine, not who *has* executed it, but who *proposes* to execute it, an actual execution, *by signing*, is the greatest possible evasion, and the most express violation of the fair import of language. If it had not been practised so long as to become familiar, its absurdity would render it too ludicrous for the adoption of the courts; and it is probable the case of Lemaine *v.* Stanley, originally, rested more upon the other ground than upon this. But that being removed, it has had a kind of precarious support from this, being all that remained, until the abuse has become too venerable to be reformed, and must, therefore, be endured, and be repeated, as often as a similar accident occurs, where the testator forgets to sign the paper before having it witnessed, however revolting to fair construction and good sense it may seem. The same view of the law is established in some of the American states. Armstrong *v.* Armstrong, 29 Ala. 538. An attestation clause without witnesses, makes the paper an unfinished instrument, even where it is signed by the testator, and the presumption of law is against such papers, even where the attestation by witnesses is not indispensable, and when offered for probate, it must be rebutted. Barnes *v.* Syester, 14 Md. 507. This seems very just.

except the year, blank, and also, "Signed and acknowledged in presence of" ——, showing the intention, at some time, both to have signed the paper, and published the same as his will, before witnesses, it was not even prima facie complete, and the court held, it was not executed by the testator. It was also held, that the finality of the testamentary intent must be * ascertained from the face of the paper, and that extrinsic evidence is not admissible, either to prove or disprove it. It was also said, that the signing must appear to have been intended to give it authenticity, that the name written was regarded as a signature, and that the instrument was complete without further signature, and that all this must appear from the paper itself.

13. It would seem that no formal publication of the will is requisite to its validity,[30] although Lord *Hardwicke*, in Ross *v.* Ewer,[31] regarded it as indispensable. But the later cases seem to have adopted the views of Lord Chief J. *Gibbs*,[32] that the * publica-

[30] 1 Jarman, ed. 1861, 74.

[31] 3 Atkins, 156.

[32] Moodie *v.* Reid, 7 Taunt. 355, 361. In this case, the decision of the court seems to have been adverse to the reasoning of Ch. J. *Gibbs*. See also, Spilsbury *v.* Burdett, 4 Ad. & Ellis, 11, 14; s. c. 6 Man. & G. 386, and 10 Cl. & Fin. 340. But the argument of Ch. J. *Gibbs*, in Moodie *v.* Reid, although it does not seem to have prevailed with his brethren, to the full extent, has nevertheless ultimately prevailed with the profession, and the courts. Any act of the testator by which he indicates that he desires to have the witnesses subscribe the paper as witnesses to his execution of it, will be sufficient publication. Dean *v.* The Heirs of Dean, 27 Vt. 746; Watson *v.* Pipes, 32 Miss. 451. But in New York, where the statute requires the testator to publish and declare the paper as his last will and testament, there must at least be some act or declaration recognizing the instrument, by the testator, as his will, and that he desires the witnesses to subscribe it as such. Hunt *v.* Mootrie, 3 Bradf. 322; Tunison *v.* Tunison, 4 Bradf. 138. And where the testatrix merely asked where was the proper place for her to sign, it was held no publication under the statute. Brown *v.* De Selding, 4 Sandf. Sup. Ct. 10. The subject is learnedly presented by *Thomas* J. in Osborn *v.* Cook, 11 Cush. 532, 534. "It is not easy to trace the origin of the belief which, we are aware, is quite prevalent, of the necessity of some formal publication of a will, or declaration by the testator that the instrument is his last will and testament; but, as a question of principle or of authority, it is now settled, that such publication or declaration is unnecessary. In the case of Wyndham *v.* Chetwynd, 1 Burr. 421, Lord *Mansfield* says, 'Suppose the witnesses honest, how little need they know; they do not know the contents; they need not be together; they need not see the testator sign (if he acknowledges his hand, it is sufficient); they need not know it is a will (if he delivers it as a deed, it is sufficient).' In Bond *v.* Seawell, 3 Burr. 1775, Lord *Mansfield* says: 'It is not necessary that the testator

tion of a will means nothing more than that a person shall declare that a certain paper is his act, and he desires it to be witnessed as such.

should declare the instrument he executed to be his will.' And Trimmer *v.* Jackson, in the King's Bench, reported in 4 Burn's Eccl. Law (9th ed.), 102, was a case where the witnesses were deceived by the execution, being led to believe, from the words used by the testator, that it was a deed, and not a will; and it was adjudged a sufficient execution. See also, Wallis *v.* Wallis, 4 Burn, 100. In Moodie *v.* Reid, 7 Taunt. 361, Chief Justice *Gibbs* says: 'A will, as such, requires no publication; be publication what it may, a will may be good without it.' In the more recent case of White *v.* Trustees of the British Museum, 6 Bing. 310, it was held, that a will was sufficiently attested when subscribed by three witnesses, in the presence and at the request of the testator, although none of the witnesses saw the testator's signature, and only one of them knew what the instrument was. Chief Justice *Tindal* treats the law as fully settled, that a bare acknowledgment by the testator of his handwriting, is sufficient to make the attestation and subscription of the witnesses good within the statute, although such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of signing. See also, Wright *v.* Wright, 7 Bing. 457; Johnson *v.* Johnson, 1 Cr. & M. 140. In Ilott *v.* Genge, 3 Curteis, 181, Sir *Herbert Jenner Fust*, referring to the case of White *v.* Trustees of British Museum, says: 'This is a determination, that where a testator had written a will himself and signed it, and produces that will, so signed (for that is a point never to be lost sight of), to witnesses, and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them is his will, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will.' It would be more exact to say, the instrument is acknowledged to be his act, which, upon production, is found to be his will. In our own commonwealth the decisions lead to the same conclusion. In the case of Swett *v.* Boardman, 1 Mass. 258, relied upon by the appellees, the marginal note of the reporter is calculated to mislead. The case was decided, and rightly, upon the ground that the testator did not know he was executing his will. *Sewall*, J. says: 'I do not find any cases which have been decided, expressly determining what amounts to a publication. But there must be proof that the person knew the instrument to be his will; that he intended it as such. In the case now under consideration, there is * no evidence, except the signature of the deceased, of these facts. I do not think that any particular ceremony of publication is necessary, or material; but the deceased ought at least to have known and understood that he was executing his will.' *Sedgwick*, J. places the decision upon the same ground; but says: 'It ought at least to appear that the person knew he was executing his will, and that he communicated that fact to those who were called to attest the same as witnesses; and this is necessary to prevent imposition, from the situation in which persons frequently are at the time of executing these instruments.' This point does not seem necessary to a determination of the case, or to be in harmony with the authorities; and the reason of it would not apply to the case of a will written by the testator himself. *Dana*, Ch. J., puts the decision upon the same

* 14. In New York, where the statute expressly requires the testator shall publish and declare the paper as his last will and testament, and the subscribing witnesses do not recollect whether the prescribed formalities were complied with or not, other evidence may be received in regard to that point, and the fact that the attestation clause shows an enumeration of all the statutory requirements as having been complied with, will not avail, if, upon the proof, it appears such was not the fact.[33] As where it

ground — that there was not a particle of evidence that the testator knew he was making a will. The more recent cases, Dewey *v.* Dewey, 1 Met. 349, and Hogan *v.* Grosvenor, 10 Met. 54, recognize and adopt the principles stated in the case of White *v.* Trustees of British Museum. In Hogan *v.* Grosvenor, *Hubbard*, J., said: 'We consider the law as settled, that the testator need not execute the instrument in the presence of the witnesses; that they need not sign in the presence of each other; and that all which is required is, that the testator shall see their attestation, or be in a situation where he can see it. His acknowledgment that the instrument is his, with a request that they attest it, is sufficient.'" See Gamble *v.* Gamble, 39 Barb. 373; 38 id. 148, 364; Secherest *v.* Edwards, 4 Met. Ky. R. 163.

[33] Lewis *v.* Lewis, 1 Kernan, 220; Hunt *v.* Mootrie, 3 Bradf. (N. Y.), 322; Tunison *v.* Tunison, 4 Bradf. 138, where it was held a sufficient publication that the testator acknowledged the instrument to be his last will and testament, and in reply to interrogatories requested the witnesses to sign it. But in Missouri, mere acknowledgment in the presence of the witnesses is sufficient. Cravens *v.* Faulconer, 28 Mo. (7 Jones), 19. See also, 2 Barb. (N Y.), 385.

The New York cases require both publication and distinct acknowledgment of the testator's signature to the witnesses, unless where it is executed in their presence. Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85. They may be both combined in the request to the witnesses to attest the will. Rieber *v.* Hicks, 3 Bradf. Sur. Rep, 353; or both may be performed by questions put to the testator and his affirmative answer. Tunison *v.* Tunison, supra. The testator must either subscribe, or acknowledge the signature to the will, in the presence of both witnesses. The presence of one is not enough. Lewis *v.* Lewis, supra; s. c. 13 Barb. 17; Butler *v.* Benson, 1 Barb. 526. But he may subscribe in the presence of one and acknowledge it separately to the other. 4 Kent, 516; 5 N. Y. Dig. by Abbott, 367, pl. 69; Whitbeck *v.* Patterson, 10 Barb. 608; Torry *v.* Bowen, 15 Barb. 304; Burritt *v.* Silliman, 16 id. 198; Nipper *v.* Groesbeck, 22 id. 670. The publication must be in the presence of both witnesses, by declaration, that the instrument is the testator's last will and testament. It is not sufficient that he make such declaration in the presence of one witness and sign it in the presence of two who subscribe the same as witnesses at his request. Seymour *v.* Van Wyck, 2 Selden, 120; Tyler *v.* Mapes, 19 Barb. 448. There must be some word or act indicating on the part of the testator that it is his will which he desires to execute and to have the witnesses attest. 2 Barb. 385; 1 Denio, 33; Nipper *v.* Groesbeck, 22 Barb. 670. Knowledge of the character of the instrument gained in some other mode, as by reading the attestation clause, is not sufficient.

* appears that the paper was not subscribed by the testator, in the presence of the witnesses, and that at the time of the attestation by the witnesses, it was so folded that they could not see whether it was signed or not, and the testator made no remark except, "I declare the within to be my will and deed," it was held not a sufficient compliance with the requirements of the statute.[33] The testator must declare that the instrument is his will, and must acknowledge that he signed it.[34] All the * requirements of the statute must be substantially complied with, but it is not indispensable that all the witnesses should be able to testify to that extent. It will be sufficient to establish the instrument if one witness so testifies.[34]

15. And where all the witnesses have lost the recollection of the fact of execution, as is not uncommon in practice, the attestation clause containing all the statutory requisites, and the witnesses recognizing their signatures, or being deceased, or removed beyond the jurisdiction of the court, upon the proof of their signatures, the execution of the will would probably be held prima facie established, where there was nothing to bring the matter in question.[35] And it

3 Bradf. 322; s. c. affirmed, 26 Barb. 252; reversed, 23 N. Y. 394. But reading the will in the presence of the testator and the witnesses, and then signing by all in the presence of each other, is sufficient. Moore *v.* Moore, 2 Bradf. 261. If there are three witnesses, and two of them comply with the requirements of the statute, it is sufficient. Lyon *v.* Smith, 11 Barb. 124; Carroll *v.* Norton, 3 Bradf. 291. See also, Brinckerhoff *v.* Remsen, 8 Paige, 488.

*[34] Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85; Newhouse *v.* Godwin, 17 Barb. 236. The statute of North Carolina requires publication of the will, and so does that of New Jersey. Den *v.* Mitton, 7 Halst. 70. In Maine, all that is requisite by way of publication is, that there be a mutual understanding between the testator and the witnesses, that one is executing, and the others attesting, the will of the testator. Cilley *v.* Cilley, 34 * Me. 162. In South Carolina, it does not seem to be required that the testator make any formal publication of his will. Verdier *v.* Verdier, 8 Rich. 135.

[35] Lloyd *v.* Roberts, 12 Moore, P. C. C. 158. Even where the only subscribing witness who was living, testified that the attestation of the witnesses was made to the blank signature of the testator, he being a professional man, well acquainted with the forms of executing wills, and every thing appearing regular on the face of the will, it was admitted to probate, the presumption of law, that the will was written before the attestation and duly acknowledged at that time, was allowed to prevail over the testimony, the Judicial Committee being of opinion the witness was either mistaken as to the fact at the time, or his memory had failed. Id. See also Trustees of Theological Seminary *v.* Calhoun, 25 N. Y. R. 422; Orser *v.* Orser, 24 id. 51. Post, § 19, pl. 12, n. 29.

has been held, that where one or more of the witnesses to the will, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from the other testimony in the case, the court or jury are satisfied the fact was otherwise, the will may be established in opposition to the testimony of all the witnesses.[36]

16. There seems to have been some question made in the earlier cases,[37] whether it was sufficient execution of a will, for * the testator to acknowledge his signature in the presence of the witnesses. But it is now firmly established, that such acknowledgment is all that the statute requires, and that it is not requisite that the acknowledgment should be in the presence of all the witnesses, at the same time, but it may be made to each witness separately.[38]

17. And the English courts do not seem to have required that the testator should have made even this acknowledgment in terms, or that the witnesses should have been made aware, at the time of signing the paper, that it was the will of the person calling them to witness it.[39] But the cases which have been *relied upon to estab-

[36] Jauncey *v.* Thorne, 2 Barb. Ch. 40; Peebles *v.* Case, 2 Bradf. Sur. 226; Rogers *v.* Diamond, 8 Eng. (Ark.), 474; Hall *v.* Hall, 18 Ga. 40. See post, § 19, pl. 6, n. 14.

[37] Cook *v.* Parsons, Prec. in Chancery, 184; Dormer *v.* Thurland, 2 P. Wms. 506. In this last case the will was executed under a power requiring the will or instrument to be under "hand and seal," and being referred to the Court of King's Bench, it was determined that the will was not a good execution of the power, "for want of being sealed." The Chancellor thought the acknowledgment of the instrument, in the presence of the witnesses, as good as signing in their presence.

[38] White *v.* British Museum, 6 Bing. 310; 7 Bing. 457. Case cited in argument, Smith *v.* Codron, 2 Ves. Sen. 455.

[39] Stonehouse *v.* Evelyn, 3 P. Wms. 253; Grayson *v.* Atkinson, 2 Ves. Sen. 454; Ellis *v.* Smith, 1 Ves. Jr. 11; Addy *v.* Grix, 8 Vesey, 504; Westbrach *v.* Kennedy, 1 Ves. & B. 362; Wright *v.* Wright, 7 Bing. 457; White *v.* The British Museum, 6 Bing. 310; Jones in re, 33 Eng. L. & Eq. 620.

The case of Trimmer *v.* Jackson, 4 Burns' Eccl. Law, 116, is where the testator deceived the witnesses in regard to the instrument, making them believe that it was a deed, and it was held a valid execution, "for the inconveniences that might arise in families, from having it known that a person had made his will." If this be sound law it puts the matter at rest. But it is obvious Ch. J. *Tindal* did not regard the law as having gone this length, or he would not, in White *v.* The British Museum, supra, have argued the case, so much at length, in order to show, that the testator did in *fact* call upon the witnesses to attest the execution of his will, and they were bound to so understand it, and must, at the time, although not now remembering it, have understood they were called to witness the execution of

lish this latter point, seem to us to be either cases of no authority, or else to have been placed upon other grounds. The case of Smith *v.* Codson is certainly not to be regarded as of much weight, being only reported, loosely, by counsel in argument, and adducing, in confirmation of the attestation, the fact that the testator told the witness, two hours after he had witnessed the paper, that it was his will, which could not be of any importance, in any possible view of the case.

18. It has been held in Vermont, where the statute requires the will to be executed in the presence of witnesses, that it is not essential that the formal signature should be *made* in the presence of the witnesses; it will be sufficient if the testator declare it to be his will in the presence of the witnesses.[40]

19. And the execution of the will of a blind person is sufficient, within the terms of the statute requiring the attestation of the witnesses in his presence, if they attest the instrument so within the reach of the testator's remaining senses, that he may, if he choose, ascertain their presence, and the fact that they are attesting the same instrument executed by him as his will. He must also be made aware that the witnesses are so attesting the * instrument at

a will. The case of Swett *v.* Boardman, 1 Mass. 258, is an express decision, that where the witnesses are deceived, as to the nature of the instrument which they are called to witness, it will not be held a valid execution of a will. It has been expressly decided, in this country, that attesting means something more than barely subscribing the name to the paper; it has reference to some mode of authenticating it, and implies a knowledge of its character. Swift *v.* Willey, 1 B. Mon. 117. See also, Neil *v.* Neil, 1 Leigh, 6; * Mason *v.* Dunman, 1 Munf. 456; Parsons *v.* Parsons, 2 Greenl. 298; Bennett *v.* Jackson, 2 Phillim. 190; Lemann *v.* Bonsall, 1 Add. 389.

The acknowledgment of testator's signature generally, in the American states, is held equivalent to signing in the presence of the witnesses. Dudleys *v.* Dudleys, 3 Leige, 436; Hall *v.* Hall, 17 Pick. 373. This may be by acts, if clear and explicit, as well as by words. Nickerson *v.* Buck, 12 Cush. 332; Tilden *v.* Tilden, 13 Gray, 110. But the will must be signed. Dunlop *v.* Dunlop, 10 Watts, 153. And in New Jersey, where the statute requires the testator to sign in the presence of the witnesses, his acknowledgment of the signature is not sufficient. Den *v.* Mitton, 7 Halst. 70. See also, Mickle *v.* Matlack, 2 Harrison, 86; Butler *v* Benson, 1 Barb. 526; Adams *v.* Field, 21 Vt. 256; Rosser *v.* Franklin, 6 Grattan, 1; Hoffman *v.* Hoffman, 26 Ala. 535.

[40] Adams *v.* Field, 21 Vermont, 256. The same rule obtains in Pennsylvania, Virginia, and Kentucky. Lay *v.* Kennedy, 1 Watts & S. 396; Beane *v.* Yerby, 12 Grattan, 239; Upchurch *v.* Upchurch, 16 B. Mon. 102.

the time, or it will not be a subscribing of the witnesses in the presence of the testator.[41]

20. And it has been held, in Virginia, that it is not essential that the testator should either make or acknowledge his signature in the presence of the witnesses, it being sufficient, if, in their presence, he acknowledged the instrument produced by him to be his act, he having previously subscribed the same, even without declaring it to be his will, in the presence of the witnesses.[42] And this will be a sufficient ratification or adoption of the signature and the instrument (even where his name was subscribed by another person at his request), as made by him in his presence and by his direction.[42]

21. And in Ohio, where the law requires, that if the witness do not see the will subscribed by the testator, he shall hear the testator acknowledge that he did subscribe it, it is not considered essential that this acknowledgment be made in words. It may be done by signs, motions, conduct, or attending circumstances. It is sufficient, if in any manner the witness is given to understand, that the testator has signed the paper as his will, and this may be shown by direct or circumstantial evidence, and is matter of fact to be determined by the jury.[43]

* 22. It is said, indeed, by Lord *Mansfield*,[44] "It is not necessary the witnesses should attest in the presence of each other, or that the testator should declare the instrument he executed to be his will, or that they should know the contents," all which is very

[41] Ray *v.* Hill, 3 Strobh. 297.

[42] Rosser *v.* Franklin, 6 Grattan, 1. And where one of the witnesses wrote the name of the testatrix, in her presence and at her request, without any design on her part to put her mark to it, until the idea occurred to her after the attestation of the witnesses, it was held to be a matter of supererogation, and that it was wholly immaterial, whether the testatrix so affixed her mark before or after the subscription of the witnesses. See also, Rucker *v.* Lambdin, 12 Sm. & M. 230.

[43] *Bartley*, Ch. J., in Raudebaugh *v.* Shelley, 6 Ohio, N. S. 307, 315; S. P. Coffin *v.* Coffin, 23 N. Y. 9. In a very late English case, the will was signed by the testator in the absence of the two attesting witnesses, and the survivor of these negatived any acknowledgment of the will before them, but admitted the will was on the table signed, before the testator, and that it was handed over to them, to sign. The scrivener and defendant, who were present, swore to an express acknowledgment. It was held that there was such acknowledgment; but besides there was enough to constitute an implied one in law. Todd *v.* Thompson, 9 L. T. N. S. 177, Ir. Prob.

[44] Bond *v.* Seawell, 3 Burr. 1773.

obvious. But the marginal note in White *v.* The British Museum, supra, goes beyond this, and declares the paper sufficiently attested, although none of the witnesses saw the testator's signature, and only one of them *knew what the paper was*. But it is ovservable, in the very carefully prepared opinion by *Tindal*, Ch. J., the question is very differently stated by the learned judge, as being, "Whether upon this special verdict, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses, *that this instrument* was his will?" The learned judge then proceeds to answer the question in the affirmative, and to declare that the case comes within the authority of Ellis *v.* Smith,[45] and that in the

[45] 1 Ves. Jr. 11. In this case there was an express declaration by the testator, that the paper was his will, and this was held equivalent to signing, being the adoption of his name written in the will, as a signature. We see no good reason why any act of adoption of the paper, as the will of the party, is any more indispensable, where the will is not signed, than where it is. The act of desiring the witnesses to authenticate the paper, as a valid act of the party, implies that it is to be authenticated for what it purports to be. It may be said, perhaps, that when the courts dispensed with all formal publication, there remained no necessity for the witnesses to be made aware of the nature of the transaction which they were called to witness. And as the statute does not expressly require publication, the courts, in their zeal to support wills, have virtually dispensed with it, although not in express terms, in any case which we have noticed. It is certainly not a wise course of decision, if entirely sound. The statutes of many of the states, in terms, require formal publication of the will, which can only be done by a declaration to that effect, or, where the testator is unable to speak, some very clear token or sign. 4 Kent, Comm. 513–517. And the entire frame of the statute of frauds shows clearly enough that it was expected the witnesses would understand the nature of the transaction in which they were engaged, by requiring that it should be attested and subscribed by them. But there has been so much refinement upon this point, that it is impossible now to declare, with much certainty, precisely how the law does stand. In Brinckerhoff *v.* Remsen, 8 Paige, 488, and s. c. 26 Wendell, 330, it is argued by the Chancellor and by Mr. Ch. Justice *Nelson*, that as no formal publication of the will by the testator was required under the statute of frauds, it was not even required, that the witnesses should understand from the testator what was the nature of the instrument. That might be left to inference. The law upon the subject seems to be more correctly laid down by *Sedgwick*, J., in Swett *v.* Boardman, 1 Mass. 258, 262, than in any other case we have noticed. "The statute does not expressly require *publication* — but in my opinion it ought at least to appear, that the person knew he was executing his will, and that he communicated *that* fact to those who were called to attest the same as witnesses. This is necessary to prevent imposition." This is one object, undoubtedly, of calling so many witnesses about the testator. But the preponderance of authority seems to be in favor of no acknowledgment of the paper as a will before the wit-

execution of wills, as well as that * of deeds, the maxim will hold good, "non quod dictum sed quod factum est inspicitur." All this is most unquestionable. And the mere fact that one calls upon witnesses to subscribe a paper, as witnesses of its execution, is, no doubt, abundant evidence of his acknowledgment that he executed it. And the distinction may be rather nice, when it is admitted the witnesses need not know the contents of a will, to argue that they should be made aware, either by word or act, that the testator declared or recognized, in some way, the paper to be his will. But such would seem to be the fair implication of the word attested, in the statute in regard to the execution of wills. But the weight of authority seems to be in the opposite direction.

23. The witnesses, it has often been said, are placed about * the testator to observe and testify to his mental capacity to do the act; and they are allowed to express a direct opinion in regard to the point, even where other witnesses are not. It would therefore seem indispensable to the office for which they are selected, that they should, in some way, be made aware of the nature of the transaction in which they are engaged. And it seems not quite clear that the decisions upon this point, under the statute of 1838, have not required that the testator should declare, either by word or deed, that the instrument is his will,[46] although the statute, in terms, dispenses with any formal publication of the instrument, which has very commonly, of late, been held equivalent to saying, that it is not important the witnesses should even understand what is the nature of the transaction, or that the instrument witnessed is of a testamentary character. But from a full consideration of the terms of the statute, and the obvious purpose of calling such a number of witnesses about the testator, in this solemn act of the final disposition of his property, in order to prevent imposition upon the testator, and to insure the fact that he was of sufficient capacity to do the act, and understood what he was about, we can entertain no doubt it was expected the witnesses would be in some way given to understand, that the testator was aware of the nature

nesses being necessary. That rule led to express statutes, in some of the states, requiring publication. Green *v.* Crain, 12 Gratt. 252. A will subscribed by three witnesses, at the testator's request, and in his presence, he declaring it to be his will, is well attested, although neither of the witnesses saw him sign it, or heard him acknowledge his signature thereto, and only one of them saw the testator's name thereon. Dewey *v.* Dewey, 1 Met. 349; Tilden *v.* Tilden, 13 Gray, 110.

* [46] 1 Jarman, ed. 1861, 102, 103.

of the transaction in which he was engaged; and this, it would seem, should come from the testator himself, either by word or deed; and if the testator is required to give this evidence to the witnesses, of his own comprehension of the nature of the transaction in which he desired to engage their assistance, it must follow, by consequence, that they would also of necessity be aware of it too. This appears to us something distinct from publication, and would seem also reasonably to be required, as well under the present English statute as the former one. But perhaps the decisions do not exactly require all this.

24. Where the statute requires a will to be executed with * prescribed formalities, the mere draft of a paper for a will, even if shown to have been made in strict conformity with instructions from the testator, will be of no avail, unless executed by him, even where the testator became incapable of understanding and executing the same before it could be prepared, and remained so until the time of his death.[47] But in Maryland, it was held, that a paper intended as instructions to enable a scrivener to make a will, if the final act be left unfinished, may become a will by any providential incapacity thereafter occurring, provided that up to that time the person remained of the same mind.[48] A will must be perfect at the decease of the testator, or it cannot take effect as a will.[49]

*[47] Aurand *v.* Wilt, 9 Barr. 54; Dunlop *v.* Dunlop, 10 Watts, 153; Stricker *v.* Groves, 5 Whart. 395; Cavett's Appeal, 8 Watts & S. 21, 26; Ruoff's Appeal, 2 Casey, 219. This point would scarcely have been deemed worthy of mention, were it not for the numerous cases in the English books (before the late statute, when testamentary dispositions of personalty were not required to be in writing, and if so made, were not required to be signed by the testator), where similar instructions, and under similar circumstances, have been held entitled to probate in the ecclesiastical courts, as valid wills. The Pennsylvania statute qualifies this.

[48] Boofter *v.* Rogers, 9 Gill, 44. But this case must have been decided under a similar statute, and upon the same ground, as the English cases upon the same question. Ante, § 17. Some of the cases cited in note 45, admit the same rule as to personalty.

[49] Vernam *v.* Spencer, 3 Bradf. Sur. Rep. 16. In this case the testator having determined to modify a previous will, and the instrument prepared conformably to his instructions, having been placed before him for execution, in the presence of two witnesses attending at his request, he signed it at the foot, and was seized with death as he was in the act of signing in the margin. It was held that the requirement of the statute in reference to the attestation of the witnesses had not been complied with, and that the instrument could not be regarded as a valid will, not being completely executed in the lifetime of the testator. There was no testamentary declaration or rogation of the witnesses. There is no will until the

* 25. The use of a seal in the execution of a will, is dispensed with in most of the states, but was retained in New Hampshire, so lately as the date of the Revised statutes of that state.[50] But there can be no question that a seal is unimportant in the execution of a will, unless it is required by statute, or unless done in execution of a power specially required to be done under seal, in which case we have seen, it will be indispensable.[51]

26. Some of the states require the signature of the testator to be made at the end of the will.[52] In New York and Arkansas, both the testator and the witnesses are required to subscribe their names at the end of the will. And the same rule seems to prevail in Kentucky, under the revised statutes.[53] In most, if not all the other states, the rule is the same as under the English statute of frauds, and the place of the signature is unimportant, if the testator acknowledge the instrument as his will.[54]

statutory ceremonies are complied with. The act was merely inchoate. The act of the witnesses is just as essential as that of the testator. The request to the witnesses is revocatory until executed, and death revokes it. The witnesses must sign under a present existing request, until this act is completed. The fact of testacy or intestacy is irrevocably fixed and determined at the moment of death.

[50] Rev. Stat. N. H. ch. 156, § 6.

[51] Hunt *v.* Wilson, 1 Dall. 94; Arndt *v.* Arndt, 1 S. & R. 256; Pratt *v.* M'Cullough, 1 M'Lean, 69.

[52] This is so in Pennsylvania and Ohio. Hays *v.* Harrden, 6 Penn. St. 409.

[53] 2 Rev. Stat. 458, sec. 5. In the recent case of Soward *v.* Soward, 1 Duvall, 126, it is held, that, under this provision of the statute in that state, both the name of the testator and of the witnesses must appear at the foot, or end, of the will; and where the testator wrote and subscribed his will on the first and half the second side of a sheet of cap paper, and then folded it together, sealed it so as to exclude the writing from view, and asked the witnesses to attest it as his will, which they did by signing their names upon the outside, which was upon the fourth side of the sheet, it was not regarded as a valid execution as a will. One object of the requirement of the statute, it is here said, is to prevent fraudulent additions to the instrument; and where there is an unnecessary and unreasonable extent of blank space between the body of the will and the signature of the testator, or the names of the witnesses, such will is not sufficiently executed or attested. No law, or rule, can be laid down as to what is an unreasonable or unnecessary space of blank in such cases. Ib.

[54] Miles' Will, 4 Dana, 1; Jackson *v.* Vandusen, 5 Johns. 144; Dewey *v.* Dewey, 1 Met. 349; Hogan *v.* Grosvener, 10 Met. 54; Rutherford *v.* Rutherford, 1 Denio, 33; Remson *v.* Brinkerhoff, 26 Wendell, 325; s. c. 8 Paige, 488. In Dewey *v.* Dewey, supra, and Hogan *v.* Grosvener, supra, and in Welsh *v.* Welsh, 2 Mon. 83; Burwell *v.* Corbin, 1 Rand. 131, and in Rush, *v.* Cornell, 2 Harring. 448, it is held, that a distinct acknowledgment by the testator of his signature in the presence of

27. In the State of Georgia it has been decided, that a statute requiring, after a certain date, all wills of personalty to be executed with the same formalities as those of real estate, will apply to wills executed before that date, if the testator deceases after that date.[55]

* 28. Where, at the testator's request, a friend drew up the will, and the witnesses signed it in the testator's presence, and it was then read aloud to him, with the names of the witnesses, and he then signed it, this was held a valid execution.[56] The whole paper was read, inclusive of the names of the attesting witnesses, and both the reading and the signature of the decedent were in the presence of the witnesses. The particular order of the several requisites to the valid execution of a testament, is not at all material, provided they be done at the same time and as part of the same transaction.[56] It was here held, that whether a paper be testamentary or not, must depend upon its provisions. If the paper contain provisions dependent upon the death of the maker, that determines its character to be testamentary.

29. And under the New York statute, where formal publication is expressly required, it is not indispensable, that any particular form of words be used, either in admitting the signature, or in the request to the witnesses to attest the will.[57] It is sufficient if the formalities of the statute are, in substance, complied with.[57] Where the testator, in the presence of the witnesses, dictates the will, signs it, reads it aloud after it is signed, and requests them to attest it, the substance of what the statute requires is performed.[58]

the witnesses, is the same as making it in their presence. And it seems strange that any question should ever have been made upon this point.

[55] Sutton *v.* Chenault, 18 Ga. 1. See post, § 30 a, pl. 18.

[56] Vaughan *v.* Burford, 3 Bradf. Sur. Rep. 78; Miller *v.* McNeill, 35 Penn. St. 217. Whether the transaction be all one is matter of fact, to be determined by the triers, in each particular case. But it is said, the omission of the person who writes the testator's name to add his own name as a witness does not avoid the will. And it is not important whether the publication precede or follow the attestation and signature, if all form but one transaction. Hollenbeck *v.* Van Valkenburgh, 5 How. Pr. 281; Doe *v.* Roe, 2 Barb. Sup. Ct. 200.

[57] Nelson *v.* McGiffert, 3 Barb. Ch. 158; Seguine *v.* Seguine, 2 Barb. Sup. Ct. 335.

[58] Carle *v.* Underhill, 3 Bradf. Sur. Rep. 101. The witnesses are held sufficiently to have subscribed the will at the request of the testator, where the draughtsman called upon them, in the presence of the testator, and requested them to witness R's will, the instrument then lying upon the table, in the presence of the testator and

30. Upon the question whether the testatrix signed her own name, or it was written by another, the fact of the name being spelled in a manner which the testatrix is shown never to have * adopted, the spelling being so different in fact as to constitute a different name, is very material in determining that fact.[59]

31. It was decided, in a very recent case in Pennsylvania,[60] that where the testator's will was drawn up in his presence, and according to his directions, and he executed the same, without it being read to or by him, that it was a valid will. But we should have hesitated in such a case, where there was proof that the testator did not know the contents of the paper. There seems no ground of presumption of his knowledge in such a case. It is in fact nothing more than the attestation by the witnesses of the testator's instructions.

32. It does not seem to be requisite to the validity of a will, according to the recent English decisions, that the testator should sign it by the same name by which he is described in the will. Thus, where A. put his mark to a testamentary paper, wherein he was described throughout as B., the court being satisfied that A. executed the same by mark in due form, animo testandi, admitted it to probate as the will of A.[61]

33. In a late English case the testatrix signed her name before

witnesses, adding that R. was going to sea, and was making his will, and he wished them to witness it. And the attestation clause embracing all the particulars required by law, that, with the facts already stated was held sufficient to prove execution and publication, although, after the expiration of two years, none of the witnesses could testify that he saw the testator sign the will, or heard him acknowledge it, or that the attestation clause was either read by them or in their presence. Peck *v.* Cary, 27 N. Y. R. 9. Where the testator's name having been subscribed to the instrument, and he afterwards acknowledged it to be his will, in the presence of two witnesses, who subscribed it as such, and the testator then made his mark between the christian and surname, it was held to be a sufficient publication, and that the placing the mark to it was unnecessary; that it was immaterial whether the name of the testator or those of the witnesses were first subscribed, if the witnesses were present when the testator either wrote or acknowledged his name, and, being called upon for that purpose, actually witnessed, or attested, that fact. If the several paragraphs were read over to and approved by the testator, as they were written, that will be sufficient to show that he knew the contents of the instrument. Secherest, *v.* Edwards, 4. Met. (Ky.) R. 163.

[59] McGuire *v.* Kerr, 2 Bradf. Sur. Rep. 244, 255.

[60] Hess' Appeal, 43 Penn. St. 73.

[61] Douce in re, 2 Swab. & Trist. 593; s. c. 8 Jur. N. s. 723.

the witnesses, below where they signed, but at the same time; and subsequently, executed a codicil in a similar manner; and it was held no objection to the validity of the instruments.[62]

SECTION IV.

THE MODE OF SUBSCRIPTION AND ATTESTATION BY THE WITNESSES.

1. Witness may sign by mark, by initials, and by fictitious name, but not by seal.
2. His hand may be guided by another, if he cannot write.
* 3. But according to the English cases, he cannot adopt a signature written by another, or by himself at another time.
n. 8. The American courts do not adopt this refinement. It seems unreasonable.
4. The English courts require he should write his name.
5. Or at the least do some present act of attestation. Sir C. Cresswell.
6 and n. 14. Need not sign any attestation clause. Not material on what part of will.
7. Lord Campbell's commentary on the cases.
8. Consideration of the import of the term "subscribe" in the statute.
9. The subject elucidated by numerous illustrations.
10. There may be danger of fraud. The danger from rejecting proof is greater.
n. 13. In the execution of powers, the requirements of the power must appear on the face of the will.
11 and n. 23. The presumption of the due execution of a will is greatly favored by courts.
12. But the will must appear regular on its face, or if lost, such fact must be proved.
13. The attestation clause often affords great evidence of due execution.
14. This clause aids the recollection of the witnesses, and gives confidence to the court.
15. But any omission in this clause may be supplied by proof aliunde.
16. Such an omission creates more doubt than if there had been no attempt to state particulars.
17. To become a witness one must do some act animo testandi.
18. But it is not essential that this be done without assistance.
19. In the American states witnesses may attest by mark, or the name be written by another.
20. Where the witness has deceased, proof of his handwriting, is proof of his attestation in due form.
21. Late English cases hold the witnesses must sign or make mark on will.
22. The entire omission of attestation clause does not defeat presumption of due execution.
23. Meaning of signing by witnesses at foot or end of will.
24. What required for publication in presence of witnesses.

§ 19. 1. There seems to be no difference, in legal significance,

[62] Hoskins in re, 32 L. J. Prob. 158.

between the word "sign," which, in the statute, is applied to the devisor, and the word "subscribe," which is applied to the witnesses. Hence it has been held the witnesses may subscribe by mark,[1] or by initials,[2] or by a fictitious name,[3] if used without * the purpose of personating another.[4] But putting their seals to the will is not sufficient.[5]

2. If the witness cannot write, his hand may be guided by another.[6] But it was doubted, if the witness could write, whether it was sufficient for him to touch the top of the pen while another writes his name.[7]

3. But as the statute requires the witnesses to subscribe the instrument in the presence of the devisor, their subscription cannot be by a signature made by some other person, or by themselves at some other time, and adopted for the occasion, as we have seen may be done in the case of testators.[8] It was recently decided by the Supreme Court of Vermont, where the statute requires wills to be "in writing, and signed by the testator, or by some other person in his presence and by his express direction, and attested, or sub-

[1] Harrison *v.* Harrison, 8 Vesey, 185; Addy *v.* Grix, id. 504; Re Amiss, 2 Rob. 116; 7 Notes Cas. 274; Re Ashmore, 3 Curteis, 756. Marksmen may be witnesses to a will, Ford *v.* Ford, 7 Humph. 92; Pridgen *v.* Pridgen, 13 Ired. 259.

[2] Re Christian, 2 Rob. 110, 7 Notes Cas. 265.

[3] Re Olliver, 2 Spinks, 57.

[4] Pryor *v.* Pryor, 29 L. J. Probate, 114. In a very late case before the Court of Probate, In re Sperling, 9 Jur. 1205, Nov. 1863, it was held by *Wilde*, J., that where the testator signed his name in the presence of two witnesses, one of whom attested the deceased's signature in the usual way, but the other wrote the words, "Servant to Mr. Sperling," the testator, without writing his own name, it was held, that as the witness intended by what he wrote, to identify himself, as being present, and attesting, the requirements of the statute were satisfied.

[5] Re Byrd, 3 Curteis, 117.

[6] Harrison *v.* Elvin, 3 Q. B. 117; Re Frith, 4 Jur. N. S. 288.

[7] Re Kilcher, 6 Notes Cas. 15.

[8] Moore *v.* King, 3 Curteis, 243; 1 Jarman, ed. 1861, 77, and cases cited in notes. Witness' hand may be held and guided by another, but each witness must write his own name, and one cannot write the name of another, under the impression that the other cannot write well. Ex parte Leroy, 3 Bradf. Sur. Rep. 227. But the attestation clause in a will is not indispensable. Frye's Will, 2 R. I. 88. Witness' name may be writted by another at his request. Jesse *v.* Parker, 6 Grattan, 57; Upchurch *v.* Upchurch, 16 B. Mon. 102. See also Horton *v.* Johnson, 18 Ga. 396. So the witness may adopt a name already written, as well as to re-write it. Pollock *v.* Glassell, 2 Gratt. 439. This seems to us altogether more reasonable than some of the nice refinements of the English courts upon this point. See post, § 20, pl. 5, n. 6; post, pl. 19.

scribed, by three or more credible witnesses, in the presence of the testator and of each other," that where the testator, in the presence of the executor and two other witnesses, subscribed his name to the will, and the other two witnesses also subscribed as witnesses, and it being doubted if the executor could act as a witness, another person was called in for that purpose, to whom the testator and the other witnesses acknowledged their signatures, and who then subscribed his name, as a witness, in the presence of the testator and the other two witnesses, the will was not duly executed, and could not be admitted to probate.[9]

4. Nor can the witness, in case of reëxecution, adopt his * former attestation, by passing over the marks with a dry pen.[10] Nor will adding to the former subscription the place of residence of the witness, make a proper reattesting.[11] The witness must resubscribe the instrument in a manner which will be apparent upon the paper.[12]

[9] Heirs of Pope *v.* Exrs. of Pope, 37 Vt. R. This case was tried at the Circuit before Chief Justice *Poland*, who held the execution valid, and admitted the will to probate. It is to be regretted, we think, that the full court could not so far have shaken off the trammels of the few English decisions upon the point as to have considered the question upon principle, and come to the same reasonable and just conclusion with that adopted in the court below. There seems to be something exceedingly incongruous, in holding the acknowledgment of his signature, by the testator, sufficient execution by him; and the same act by the witnesses an insufficient attestation by them. When it becomes certain that any distinction is without just foundation, the sooner it is abandoned the better, whether others do so or not. One of the Probate courts in the state of Illinois, in a recent well-considered opinion, reviewing all the cases upon the point, adopted the view which we have ventured to urge in the present note. Vaughn *v.* Vaughn, before *Bardwell*, Judge, in Coot County, Illinois, 4 Am. Law Register, 735. But since the case of Hindmarch *v.* Charlton, 8 Ho. Lds. Cas. 160, has been affirmed by the unanimous voice of the tribunal of last resort in the authoritative exposition of the common law, it might not answer any good purpose to longer question its reasonableness or necessity. And a similar decision has been made by the Supreme Judicial Court of Massachusetts, in a case not yet reported. Thus, upon slight grounds, as it seems to us, there appears to be authoritatively established this broad distinction between the signing of a will by the testator and the witnesses, that, in the former case, it is not requisite that any act should be performed at the time; while, in the other, that is altogether indispensable.

[10] Hayne *v.* Scriben, 1 Rob. 772; 1 Jarman, ed. 1861, 77, and cases cited in notes.

[11] Re Trevanion, 2 Rob. 311.

[12] 1 Jarman, ed. 1861, 77.

5. And in a recent case,[13] under the present English statute, where the testator had acknowledged his signature in the presence of the first witness, who had subscribed the paper, as a witness, and subsequently, this witness and another being present, he acknowledged his signature to both, and the second witness then subscribed as a witness, and the first witness, seeing that one of the letters in his former signature was incomplete, crossed it, it was held, by Sir *Cresswell Cresswell*, that, although the deceased acknowledged his signature in the presence of the witnesses, present at the same time, such witnesses did not attest and subscribe the will in the presence of the testator. The learned judge said: "It was not contended, that the witness must subscribe his name, it was admitted that a subscription by initials, by a cross, or a mark of any other shape, would suffice, if placed there as a subscription animo testandi." It was claimed, in the present case, that the witness crossed the F in his name, "Frederick," to complete his former * subscription, and not as a mark of his present act, and it was not, therefore, to be treated as a new subscription.

6. It does not seem to be regarded as important, that the witnesses should subscribe any formal clause of attestation,[14] * or that

[13] Charlton *v.* Hindmarch, 5 Jur. N. S. 581; S. C. affirmed 8 Ho. Lds. cas. 160. It seems to be implied, from the language of the present English statute, requiring the witnesses to be "present at the same time," that they shall witness the execution of the will in the presence of each other. But that was not required under the statute of frauds. Green *v.* Crain, 12 Grattan, 252; Hoffman *v.* Hoffman, 26 Ala 535. And it is now settled, that, under the present English statute, it is not requisite that the witnesses sign their names in the presence of each other. 1 Wms. Exrs. 79; 3 Curt. 659, Sir *H. J. Fust;* Faulds *v.* Jackson, 6 Notes Cas. Supp. 1. But see Casement *v.* Fulton, 5 Moore, P. C. C. 130, contra.

[14] The testatum clause, as it has been called, which immediately precedes the signatures of the witnesses, is by no means indispensable, and, under the statute of frauds, it does not seem to have been regarded as any thing more than prima facie evidence of what the witnesses are to be taken to have witnessed. For where this clause contained all the other requisites under the statute, except that the witnesses signed in the presence of the testator, it was early, and has been repeatedly, held, that fact might be supplied. Hands *v.* James, Com. 531; Brice *v.* Smith, Willes, 1; Croft *v.* Pawlet, 2 Strange, 1109; Rancliff *v.* Parkyns, 6 Dow, 202; Doe d. *v.* Davies, 9 Q. B. 648. And these cases show, that the facts necessary to the due execution of the will may be inferred by the jury, from circumstances, or even from the face of the will. See also, Hitch *v.* Wells, 10 Beavan, 84, and Leacroft *v.* Simmons, 3 Bradf. Sur. Rep. 35. But in regard to wills, executed under a power requiring certain formalities, where the attestation of the witnesses is specific, enumerating a portion of the requisites of the power, and being

their names should appear after that of the testator. Where the will ended on the first side of a sheet of letter paper, and the signature of the witnesses appeared on the fourth side of the sheet, it was held sufficient.[15] So also where the will ended on the middle of the third side of the sheet, and two of the witnesses signed at the end, and one of them in a vacant space on the second side opposite the signatures of the other two, it was held sufficient.[16]

7. This being the leading English case upon this question, and coming so late, we have thought we could not present any thing more satisfactory upon the point than the following extract from the opinion of Lord *Campbell*, Ch. J.: "The first objection taken to the attestation of William Bevan was, that nothing appears on the face of the will to designate him as a witness. But we think that this objection cannot be supported, if the will can be considered as subscribed by him within the meaning of the fifth section

silent as to others, it has been settled by a series of decisions, that such an instrument is not a good execution of the power. Wright *v.* Wakeford, 4 Taunt. 213; s. c. 17 Vesey, 454; Doe d. *v.* Peach, 2 M. & S. 576; Wright *v.* Barlow, 3 M. & S. 512. And even where the attestation is general, as "Witness our hand," or "In presence of us," and there is nothing on the face of the will to show that the formalities required by the power have been complied with, it is not a good execution. Moodie *v.* Reid, 7 Taunt. 355; Stanhope *v.* Keir, 2 Sim. & Stu. 37. But where the attestation clause is general, and the clause immediately preceding the execution by the testator contains all the requisites of the power, it was decided by the House of Lords, reversing the judgment of the Exchequer Chamber, and affirming that of the Queen's Bench, that the witnesses must be deemed, by this general form of attestation, to refer, either to all that appeared on the face of the will, or at the least, to what is specified in the clause which was signed by the testator immediately preceding their own attestation; it being shown by parol, that the requirements of the power were complied with. Burdett *v.* Spilsbury, 6 Man. & Gran. 386–470; s. c. 4 Ad. & Ellis, 1; 9 id. 936. There is a great diversity among the judges, in their opinions before the House of Lords, in regard to the proper meaning of "attestation" by the witnesses to a will. *Wightman*, J., regarding it as synonymous with *witnessed;* others, and a large majority, regarding it as having reference to the attestation * clause immediately preceding the signature of the witnesses, and holding that, where a statute or a power required the witnesses to attest certain formalities in the execution of an instrument, it was requisite that the certificate signed by the witnesses should, either specifically, or by implication, contain, or express, these formalities to have been complied with, and that the general form of attestation, by reference to the face of the will, or the clause signed by the testator, might be regarded as expressing, by implication, all that there appeared.

[15] Re Chamney, 1 Rob. 757.

[16] Roberts *v.* Phillips, 4 Ellis & Bl. 450; s. c. 30 Eug. L. &. Eq. 147.

of the statute of frauds. It never has been held, that a testimonium clause is necessary under this statute, or that the witnesses should be described as witnesses, on the face of the will. Nothing more is required than that the will should be attested by the witnesses, namely, that they should be present, as witnesses, and see it signed by the testator, and that it should be subscribed by the witnesses, in the presence of the testator; namely, that they should subscribe their names upon the will in his presence. Even where a will is to be executed and attested under a power, in * similar terms, the House of Lords [17] expressed a clear opinion, that if, in point of fact, the will was executed in the presence of witnesses, as the power required, and the witnesses were proved simply to have subscribed their names on the will, the will would be valid.

"A much more serious objection was then relied upon, that from the place in which William Bevan's name appears, the will cannot be considered subscribed by him within the meaning of the statute. It is a most remarkable circumstance, that no case is to be found in the books with regard to the part of the paper where the attesting witnesses to the will ought to sign their names. The only vestige of authority relied upon is the reasoning of the court.[18] There a testator, who himself wrote his will, began it thus: 'I, John Stanley,' &c.; and, according to the report, it was held to be a good will, 'for, being written by himself, and his name in the will, it is a sufficient signing, within the statute, which does not appoint where the will shall be signed, in the top, bottom, or margin, and therefore a signing in any part is sufficient.' But neither does the statute appoint where the will shall be subscribed by the attesting witnesses, and therefore subscribing in any part may be sufficient. None of the judges, in that case, intimate an opinion that the same sense may not be given to the word 'subscribe,' as to the word 'sign;' and it is difficult to conceive any reason that should have induced the legislature to require the signature of the witnesses to be at the bottom of the will, while permitting the signature of the testator to be at the top of it. The case cited from Robertson,[19] is entitled to no weight, as there an intention evidently existed, that both will and codicil should be separately signed and attested.

* [17] In Burdett *v.* Doe d. Spilsbury, 6 Man. & G. 386; 7 Scott's N. R. 66; 10 Cl. & Fin. 340.

[18] Lemayne *v.* Stanley, 3 Lev. 1.

[19] 2 Robert. 411.

* 8. "Unassisted by authority, we are therefore called upon to put a construction, for the first time, on the words of the statute; and the question is one of the utmost importance, the new Wills Act,[20] enacting that the signature of the testator shall be made, or acknowledged by him, in the presence of two or more witnesses, present at the same time, 'and such witnesses shall attest and shall subscribe the will in the presence of the testator,' without any further direction, as to the place where the witnesses shall sign their names, although minute directions are given, as to the locality of the signature of the testator by this act, and by the amending act.[21] On the part of the defendants it is powerfully urged, that the primary meaning of the word 'subscribed,' is 'written under;' that it must mean 'written under' the concluding words of the will, and the signature of the testator; that this meaning is emphatically to be given to the word subscribe in this section of the statute of frauds, from the words, which require only signing by the testator; and that the signature of the names of the witnesses ought to be so affixed to the instrument, as effectually to prevent any spurious addition to it after it has been executed. But we are bound to consider whether the legislature did here use the word exclusively in its primary and strict sense, and whether this construction would not, in many cases, defeat the object of the enactment, by nullifying wills which the legislature intended to be valid. The first meaning given by Dr. Johnson to 'subscribe' is, 'to give consent by underwriting the name,' but the second is much more extensive, 'to attest by writing the name,' an example being given by Whitgift: 'Their particular testimony ought to be better credited than some other subscribed with a hundred hands;' where it is quite clear that the locality of the signature is wholly disregarded. Again: Richardson, a high authority upon such matters, among other meanings of *'to subscribe,' gives 'to sign it in witness or attestation; to assent or consent; to witness or attest.' He gives an example from Samson Agonistes: 'Yet hope would fain subscribe, and tempts belief.' And from Smith's Wealth of Nations: 'In 1698, a proposal was made to parliament of advancing two millions to government, at 8*l.* per cent., provided the subscribers were erected into a new East India Company, with exclusive privileges.' Many familiar instances might be given, in which 'subscribe' is used

[20] 7 Will. IV. and 1 Vict. ch. 26, § 9.

[21] 15 Vict. ch. 24.

merely as a signing of the name, without any reference to the part of the paper on which the name is written.

9. "After satisfactory proof that witnesses were called in by the testator to see him execute his will, and to attest it, that they saw him execute it, and that they then signed the will, with the intention of attesting it, ought we to hold that the will is void, on the ground that their signatures are not under his? If 'subscribe' is taken in its strict primary sense, such a will is a nullity. But suppose the will was written on a sheet of paper, on four pages, that the will and the testator's signature entirely filled up the first three pages, and that the witnesses write their names at the top of the fourth page, is the will properly attested? The signatures of the witnesses are not under the testator's, and, literally speaking, they cannot be said to have subscribed the will. But was it meant by the legislature, that a will so attested should be void? Again: suppose that the will and the signature of the testator fill up the whole of the paper to the bottom of the fourth page, and that, a wide margin having been left, a regular testimonium clause is written in the margin either of the fourth, the third, the second, or the first page, and the witnesses called in by the testator to attest his will, sign this, and it is proved that they, having been called in as witnesses to attest his will, after seeing him execute it, signed this testimonium clause, in his presence and at his request, is this will to be nullified as not duly attested? Is any difference to be made as to whether the testimonium clause is written in the margin of the fourth, or any of the other pages? And if * in the margin of the fourth, whether it be at the bottom of the page, exactly opposite the signature of the testator, or at the top of the page, a long way from the signature of the testator? In none of those cases have the witnesses subscribed the will literally and strictly. But there would surely be great difficulty in holding that the will is void, with a regular testimonium clause signed by the witnesses in the margin opposite to the signature of the testator; and if the will would be valid with the testimonium clause so located, there would be great difficulty in holding it bad with the testimonium clause duly signed by the witnesses on any other part of the paper onwhich it could be conveniently and distinctly written. What effect, then, arises, from the entire absence of a testimonium clause? A testimonium clause not being indispensable, we conceive that the absence of it would only make a difference in the extrinsic evidence

which would be required to prove that the witnesses had seen the testator execute the will, and that they signed it, with the intention of attesting it, at his request and in his presence. Clear and satisfactory proof must be given upon these points; but such proof being given, we think the will ought to be held valid, although the signature of the witnesses is not under the signature of the testator.

10. "We do not overlook the danger of fraud, from our construction of the statute; but this danger cannot be so considerable as that which arises from allowing a will to be written on several pages or pieces of paper, one signature of the testator being held sufficient; and it may be observed, that forged and fraudulent wills are almost always, upon the face of them, rigidly regular and formal. But from a contrary construction, we see a certainty of honest and proper wills being nullified, when all the requisites of the law have been substantially complied with. 'Every presumption,' says Lord Mansfield, 'ought to be made by a jury in favor of such a will, when there is no doubt of the testator's intention.'"[22]

* 11. It seems to be well settled, that, in the absence of all proof, the witnesses being deceased, or not in a condition to give testimony, the presumption, omnia rite acta, will arise, as in ordinary cases.[23] So also, where the attestation is general, not enumerating the particulars, it will be presumed the will was duly executed, unless it appear to the contrary. And where the attestation clause contains all the particulars of a good execution, it will always be prima facie evidence of due execution, and will often prevail over the testimony of the witnesses, who give evidence tending to show that some of the requisites were omitted.[24] And where it appeared

[22] Bond *v.* Seawell, 3 Burr. 1773, 1775.

[23] Trott *v.* Skidmore, 6 Jur. N. S. 760; Hand *v.* James, Com. 531; Croft *v.* Pawlet, 2 Str. 1109; 1 Jarman, ed. 1861, 79; Re Johnson, 2 Curt. 341.

[24] Baylis *v.* Sayer, 3 Notes Cas. 22. See also, Gove *v.* Gawen, 3 Curt. 151; Blake *v.* Knight, id. 547; Pennant *v.* Kingscote, id. 642; Re Hare, id. 54; Cooper *v.* Bockett, id. 648; 1 Jarman, ed. 1861, 79. But it seems the effect of the certificate of attestation by a deceased witness will not be regarded as of the same force as his evidence if he were living, but is evidence of an inferior nature. If supported by circumstances, although opposed by the testimony of another subscribing witness, it may be sufficient to support a verdict establishing the will; but, without any extraneous support, such a verdict, against the positive testimony of a living witness, could not be maintained upon that evidence alone. Orser *v.* Orser, 24 N. Y. R. 51. In a late English case, Vinnicombe *v.* Butler, 3 Sw. & Tr. 580, 10 Jur. N. S. 1109, it is said the presumption, omnia rite acta, applies to the execution of a

on the face of the will, "In witness whereof, I place my signature in the presence of two witnesses," and the two witnesses, whose names appeared on the face of the will, contradicted each other as to the fact of the will having been executed in their joint presence, it was held the will was entitled to probate, chiefly upon the ground, that this fact was declared by the testator upon the face of the will.[25] And the mere forgetfulness of the witnesses of the facts certified in the attestation clause, is not regarded as any obstruction to granting probate of the will.[26] And the ecclesiastical courts have granted probate of a will, where both of the witnesses deposed that the requirements of the act were not complied with, the cir-

will, where there is a perfect attestation clause, and this presumption is not overcome by the defective memory of the witness, and that, where that clause is incomplete, the presumption also applies, but with less force; and where the attestation clause was defective, and the memory of the witness also, it being proved that the will was signed by the testator, and that the witness had been in the room with him for the purpose of attesting it, the presumption, omnia rite acta, was allowed to prevail, and the court pronounced for the will. Ib. But in another case, Croft *v.* Croft, 11 Jur. N. S. 183, where the attestation clause was complete, and signed by the witnesses at the foot, but, on examination, they deposed that the testator did not sign his name to the paper in the presence of either of them, nor did he in any way acknowledge the same in their joint presence, and there was no more evidence upon this point, the court held they could not decree probate of the will upon the mere force of the presumption arising from the attestation clause, in opposition to the express testimony of both the witnesses, that no sufficient execution did take place, there being no other testimony in the case; and especially as the attestation clause "was not written at the time, or read by the witnesses." The learned judge, Sir *J. P. Wilde*, here cited the cases of Owen *v.* Williams, 32 L. J. Prob. 159; Lloyd *v.* Roberts, 12 Moo. P. C. C. 158; Guillim *v.* Guillim, 3 Sw. & Tr. 200, as among the more recent cases bearing in favor of the will, but as not being sufficient to maintain it. But where the witnesses do not depose positively against the due execution, the presumption arising from the fact of the instrument appearing, on its face, to have been duly executed, whether the attestation clause be complete or not, is always allowed to prevail, as against the mere defect of memory in the witnesses, as to any one or more of the formal requirements of the law. Rees in re 34 Law J. Prob. 56. In Guillim *v.* Guillim, supra, the execution and attestation appeared regular upon the face of the will, and the attestating witnesses deposed that they did not recollect having seen the testator's signature when they subscribed their names. The court considered that they were at liberty to judge, from the circumstances of the case, whether it was probable the testator's name was on the will or not at the time of attestation; and, being of opinion that it was, pronounced for the will.

[25] Cregreen *v.* Willoughby, 6 Jur. N. S. 590.

[26] Re Holgate, 5 Jur. N. S. 251.

cumstances being of such a character as to convince the court that the witnesses were mistaken.[27]

12. But this presumption, it has been held, will only be made where the will, upon its face, appears to have been duly *executed, or, being lost, proper evidence is adduced of such having been the fact.[28] And the testator's own declarations to that effect are not sufficient.[29] But all presumption of the due execution of the will is rebutted, by proof that the witnesses are fictitious persons, and their names in the handwriting of the testator.[30]

[27] Leech *v.* Bates, 6 Notes Cas. 699; 1 Jarman, ed. 1861, 79.

[28] Re Gardner, 27 L. J. Prob. 51; 1 Jarman, ed. 1861, 80.

[29] 1 Jarman, ed. 1861, 80; Re Ripley, 1 Swab. & Trist. 68.

[30] Re Lee, 4 Jur. N. S. 790. There seems never to have been any serious question in practice in regard to allowing a will to be proved by other evidence than that of the witnesses, where the fact, or the mode of execution, had escaped the recollection of the witnesses, or where one or more of them denied that the instrument was executed in their presence, or denied that all the requisite formalities had been complied with. 1 Wms. Exrs. 87; Blake *v.* Knight, 3 Curt. 547; Gregory *v.* Queen's Proctor, 4 Notes Cas. 620; Thompson *v.* Hall, 2 Robertson, 426; ante, pl. 14 and notes. Thus, in Weltey *v.* Weltey, 8 Md. 15, where the will was forty years old, and two of the witnesses had deceased, upon proof of their handwriting and good character, as well as business capacity, the surviving witness testifying to the due execution in his presence and that of one other of the witnesses, it was admitted to probate. Welch *v.* Welch, 9 Rich. Law, 133. See also, Cheeny *v.* Arnold. 18 Barb. 434.

And in Kentucky, where two of the witnesses testified, that being unable to write, the scrivener wrote their names, they "holding the pen as he wrote their names;" that they could not identify the paper in contest as being clearly the one signed by them; and upon hearing it read, both agreed, that in regard to one of its provisions, it was different from the paper they heard read at the time they witnessed it; but the scrivener proved that it was the same paper witnessed by them, and which was executed by the testator as his will in their presence; it was held sufficient proof of the due execution and publication. Montgomery *v.* Perkins, 2 Met. 448. And in Michigan, where a witness called to prove the execution of a will, more than thirty years after its date, and who testified that he signed it, but had no distinct recollection of seeing the testatrix sign it, it was held he might answer the inquiry, whether looking at the attestation clause, he had any doubt the testatrix signed it in his presence, and whether he ever witnessed an instrument in that form without knowing what it was, and whether he had any doubt the persons whose names were to it were present at the time of the execution, and that it was for the jury to give such weight to the witnesses' answers, as, under all the circumstances, they thought them entitled to have. Lawyer *v.* Smith, 8 Mich. 411.

It seems always to have been held, at common law, that proof of the *execution of a will by one witness, was sufficient, provided his testimony established a com-

*13. The precise office of the attestation clause has been differently defined, and, by some, regarded as of little significance, any way. But we apprehend, that, in a practical point of view, it is really of much more importance than would generally occur, at the first glance. It serves to show, that the testator, or the person preparing the will, was aware of the specific requirements for the due execution of the instrument. And this, of itself, will raise a strong presumption, that these known and remembered requirements would, naturally, and almost necessarily, have been complied with, since it is proverbially true, that errors in the execution of wills, and other legal instruments, occur, more commonly, from mistake, misapprehension, and inattention, than from any other cause, so that, if they are once brought to the mind of the testator, near the time of the execution of the instrument, it renders it highly improbable that they would not be attended to.

14. This enumeration, on the face of the will, and especially, in the attestation clause, which is expressly subscribed by the witnesses, aids them too, in knowing, and being able to state more confidently, precisely what did occur, and at the same time gives the court a more confident assurance, that all the statutory requirements were complied with. For it is fair to presume, that the witnesses were made aware of what they did certify, and if so, that they would, at the time, have informed *themselves of the facts thus attested by them. It is upon these grounds, that the courts have been found

pliance with all the existing legal requirements. Hunt *v.* Johnson, 19 N. Y. Court App. 279, 292, 293; Jackson *v.* Vickory, 1 Wend. 412, 413; Crusoe *v.* Butler, 36 Miss. 150. And proof of the handwriting of the testator and of all the witnesses, in a will eleven years old, the witnesses being dead, is prima facie evidence of its due execution. Transue *v.* Brown, 31 Penn. St. 92; Sutton *v.* Sutton, 5 Harring. 459. So also, where one of the witnesses denies his signature and ignores the execution. Talley *v.* Moore, 5 Harring. 57. And where the witness recognized his attestation, but has no present recollection of the execution, but presumes from the attestation that it was all regular, the proof is sufficient. Hughes *v.* Hughes, 31 Ala. 519. And in a recent case in New York, Trustees *v.* Calhoun, 25 N. Y. R. 422, it was held that the publication of the will might be established by the testimony of one of the witnesses in opposition to that of the other. And it is here said that as the fact of publication is required to rebut any suspicion that the testator may have been induced to subscribe the paper, supposing it to be some other instrument than his will, the fact that he knew it to be his will may be established in opposition to the testimony of all the witnesses to the will. See also, Secherest *v.* Edwards, 4 Met. (Ky.) R. 164; Orser *v.* Orser, 24 N. Y. R. 51.

so strongly inclined to sustain wills, which, upon the facts stated therein, seemed to have been executed with due formality.

15. The American courts hold, as we have seen, that the omission of one, or more, of the indispensable requisites for the due execution of a will, in the attestation clause, or even of the whole clause, will not invalidate the instrument, provided it otherwise appear satisfactorily, that all the requirements of the law were complied with.[31]

16. But it is obvious, that such an omission raises a more natural and stronger presumption against the due execution of the instrument, than if no attempt had been made to enumerate the particulars of the execution. But there are many ways in which such an omission may be accounted for. It may have resulted from following an imperfect formula; or from inattention at the moment, or from haste, as well as from ignorance.

17. It seems to be well settled, that a person, to become a subscribing or attesting witness to a will, must intend to become so. The mere fact, that he was present at the execution of the instrument by the testator, and wrote the name of one of the witnesses upon the will, without writing his own name, under the apprehension that one witness was all that was required, will not make such person a witness. He must either sign his own name, or make his mark, or do some physical act towards affixing, or recognizing, his name upon the will, and must do this, animo testandi.[32]

* 18. And in the latter case, it was held sufficient to constitute an attestation by the witness, that he held the pen, while his hand was guided by another. But it has been held, in the English courts, that where one of the witnesses signed his own name, as a witness, and also the name of his wife, there being no proof of her concurrence in the act, it was no sufficient attestation by the wife.[33] But, as before stated, where one of the witnesses wrote his own name, and held and guided the hand of another witness, the second witness being a party to the act of attestation, it was held a valid

[31] Pollock *v.* Glassell, 2 Grattan, 439; ante, n. 8. In New York, it is required that the witnesses should sign at the end of the will, at the request of the testator, and at the time of subscription, or acknowledgment and publication by him. Butler *v.* Benson, 1 Barb. Sup. Ct. 526. And in the same case, it is said the witnesses must sign in the presence of the testator. Post, § 20, n. 6, where this is qualified.

[32] Ex parte Leroy, 3 Bradf. Sur. Rep. 227. See Campbell *v.* Logan, 2 Bradf. Sur. Rep. 90.

[33] Sir *Herbert Jenner Fust*, In the Goods of White, 2 Notes Cas. 461.

execution of the will.[34] And where another person writes the name of the witness, and guides the pen while she makes her mark, it will be sufficient.[35]

19. Most of the American states, as we have seen, allow of witnesses attesting a will by their mark.[36] And the name of one witness may be written by another witness, or by any other person at his request, unless there is something in the statute, or the construction of the courts, to forbid it.[37]

* 20. Where the witness has deceased, proof of his handwriting is prima facie evidence of his attestation in due form.[38] This question came before the Supreme Court of the United States, in regard to a California will, where all the witnesses had deceased, and the court held that proof of the signatures of the testator and all the witnesses was sufficient, the sindico, or magistrate, before whom it was executed, being treated as one of the witnesses.[39]

21. The late English cases hold, as we have shown, that it is indispensable, under their present statute (and it is substantially the same as the statute of frauds in this respect), that the witnesses to

[34] Ante, n. 6. This decision was after the act of 1 Vict.

[35] Meehan *v.* Rourke, 2 Bradf. Sur. Rep. 385. And where the witness being unable to write, another wrote the name, while he held the top of the pen, it was held sufficient, as the witness took some share in the subscription, and the court will not attempt to discriminate between the more or less agency in the matter. Lewis in re, 7 Jur. N. S. 688. Where the legatee signs his name to the will at the time of execution, although done at the request of the testator, and under a mutual misapprehension between them, that this gives greater security to the legatee, it will, nevertheless, be treated as an attestation of the will. Toker in re, 4 Law T. N. S. 183. And the name being subsequently struck out, by direction of the testator, will not affect the rights of the legatee, unless by consent of all the next of kin. Haslin in re, id. 839.

And even where a will is already attested by the requisite number of witnesses, and a devisee subscribes her name to the attestation clause, though not at the request of the testator, such devisee is, under the present English statute, excluded from taking any interest under the will. Randfield *v.* Randfield, 32 Law J. Ch. 668, by *V. C. Kindersley.*

[36] Ante, n. 3.

[37] Ante, n. 8.

[38] Nickerson *v.* Buck, 12 Cush. 332.

[39] Adams *v.* Norris, 23 How. U. S. 353. The court here give the uniform practice of the country in regard to the mode of executing wills, the effect of repealing the existing law, the custom having the tacit assent of the authorities. See also, Tevis *v.* Pitcher, 10 Cal. 465. The declarations of the testator, that he had made a will of the same character as the one presented, were held admissible to prove it. See also, Andrews *v.* Motley, 12 C. B. N. S. 526; Dean *v.* Dean, 27 Vt. 746.

a will, where they do not sign, should make some mark on the will, with the intention that the mark shall represent their signatures as attesting the execution.[40] And where the witness subscribed the name of her husband, not intending to have it represent her own name, it was held no sufficient attestation.[41]

22. The entire omission of the attestation clause in a will, even where the only surviving witness testified that the will was executed in his presence alone, and that he suggested the necessity of two witnesses, but could remember no particular circumstances, is not sufficient to rebut the presumption in favor of the due execution of the instrument.[42]

23. In New York, where the statute requires that the witnesses sign their names at the foot, or end, of the will, it was held, where a codicil was written upon one side of several sheets of paper, folded and fastened together in the form of a book, leaving alternate pages blank, and ended at the bottom of a page, where the testator signed his name, leaving no room for the attestation clause and signature of the witnesses; and to carry out the plan of writing only upon one side of the paper, the attestation clause and subscription of the witnesses were written on the second page after the testator's signature, leaving an entire blank page between them, — that this was a valid attestation by the witnesses, within the meaning of the statute. It is here said that an instrument is signed at the end, when nothing intervenes between the instrument and the subscription.[43]

24. All that is implied by the publication of a will, as required by the New York statutes, is, that the witnesses should be made aware, by some act or word or acquiescence of the testator, that he recognizes the instrument as his will, and as such desires the witnesses to attest its execution.[44]

[40] Ante, pl. 5, n. 12.

[41] Pryor *v.* Pryor, 29 Law J. N. S. 114.

[42] Thomas in re, 5 Jur. N. S. 104; ante, pl. 16, 17; Dean *v.* Dean, 27 Vt. 746.

[43] Gilman *v.* Gilman, 5 N. Y. Sur. Rep. 354.

[44] Hunn *v.* Case, 5 N. Y. Sur. Rep. 307; Van Hooser *v.* Van Hooser. id. 365.

*SECTION V.

PRESENCE OF THE TESTATOR AT THE ATTESTATION OF THE WITNESSES.

1. This implies bodily presence and mental consciousness.
2. It must not be done covertly, or without the knowledge of the testator.
3. Not required testator should see the attestation. Sufficient if he might have done so.
4. Not indispensable witnesses should be in the same house with the testator, if in a condition to be seen by him.
5. Must not appear that testator was in part of the room where he could not see the attestation.

n. 6. Extensive discussion of the points decided in the cases bearing on the question.

6. Lord Ellenborough's commentary on the last category.
7. The presumption where the testator might have seen the attestation is conclusive that he did see it; and not liable to be contradicted by evidence.
8. Bodily weakness may create constructive absence, but blindness not.
9. The courts apply the ordinary laws of human experience to these presumptions.
10. The statutes of New York do not require attestation of witnesses in the presence of the testator.
11. Hence if it be done at the same time of the execution by testator, it is sufficient.
12. Presence, in Georgia, requires the ability to perceive. Out of the room, prima facie out of sight.
13. The rule, in Vermont, requires the testator and witnesses to be able to see each other.

§ 20. 1. As both under the statute of frauds, and the present English statute, and most of the statutes in the American states, it is required that the witnesses subscribe the will in the presence of the testator, it becomes important to determine what is implied in that requirement. It is indispensable that the testator should not only be present bodily, but he should also be in a conscious state. And where the testator, after having signed and published his will, fell into a state of insensibility, before the witnesses subscribed their names, it was considered that the attestation was not sufficient.[1]

* 2. And it is necessary, not only that the testator should be in a conscious state, but the act must be done with his knowledge, and not in a clandestine and fraudulent way, since that would not be regarded as an attestation in his presence, although done in the

*[1] Right *v.* Price, Doug. 241.

same room, and while he was in a conscious state.[2] And if not done in the same room where the testator was, but so that he might have observed the attestation, it is sufficient.[3] As where the testator desired the witnesses to his will to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them: the court said: "It is enough if the testator might see."

3. "It is not necessary he should actually see them signing; for at that rate, if a man shall turn his back, or look off, it would vitiate the will." And where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names, at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he might see them subscribe their names if he would, and though there was no positive proof that he did see them subscribe, yet that was sufficient under the statute, because he might have seen them, it shall therefore be considered in his presence.[4]

4. And it does seem indispensable, that the testator and the witnesses should be in the same house at the time of the execution, in order to constitute actual presence, within the statute. For where the testatrix, being a married woman, had a power to execute a will, and ordered the same prepared by * her attorney, and went to his office to execute the same; but being asthmatical, and the office very hot, she retired to her carriage to execute it, the witnesses attending her, and after having seen the execution of the will, they returned into

[2] 1 Jarman, ed. 1861, 80; Longford *v.* Eyre, 1 P. Wms. 740. But where the witness swore that he subscribed the will at the request of the testator, and in the same room, it was held sufficient.

[3] Shires *v.* Glascock, 2 Salk. 688. One case here put by the court is, where the testator being sick, and in bed, and the curtains drawn, he would still be regarded as virtually present; S. P. Newton *v.* Clarke, 2 Curt. 320.

[4] Davy *v.* Smith, 3 Salk. 395. In the very recent case of Killick in re, 3 Sw. & Tr. 578, a codicil was signed by the deceased, who was ill in bed, in one room, and attested by two witnesses in an opposite room, but who did not see the deceased make or acknowledge her signature, or have any conversation with her respecting it. The deceased, the doors of both rooms being open, might, by raising herself in bed, have seen the witnesses sign, but there was no evidence that she did do so; and it was held to be a bad execution, on the ground that the deceased did not make or acknowledge her signature in the presence of the witnesses, and that they did not attest in her presence. The case may be consistent with the former cases, upon the first point, but probably not upon the last. Trimnell in re, 11 Jur. N. S. 248.

the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn, by a person in the carriage, the testatrix might see what passed: immediately after the execution, the witnesses took the will to her, saying they had attested it, and she, folding it up, placed it in her pocket: Lord *Thurlow* was strongly inclined to treat this as a sufficient execution and attestation of the witnesses in her presence.[5]

5. But where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found, that from one part of the testator's room, a person by inclining himself forwards, with his head out at the door, might have seen the witnesses, but that the testator was not in that part of the room, it was held, that the will was not duly attested.[6]

[5] Carson *v.* Dade, 1 Br. C. C. 99.

[6] Doe d. *v.* Manifold, 1 M. & S. 294. The Lord Chief Justice here refers to the fact of having gone to view the office, through the window of which it was proved the testatrix might have seen the will attested, while sitting in her carriage, in the case last cited. Machell *v.* Temple, 2 Show. 288, where the testator "being sick, and so great a company in the room, that the noise thereof disturbed him," he, after signing in the presence of the witnesses, and publishing the same, requested the witnesses "to go into the next room to set their names," is sometimes cited to show that such an execution is not valid. But that case being doubted by counse and court, and a special verdict ordered, the jury refused to give a special verdict, and remained obstinate, after being sent out, "twice or thrice," and "*would find* for the heir at law, saying, they were all of opinion 'twas no good will." The reporter adds the significant "Notand: The first jury that ever refused a special verdict on a point of law, they all incur the danger of attaint." Edlestone *v.* Speake, 1 Show. 89, holds the attestation bad, if in such a place "that the testator could not see the witnesses." Broderick *v.* Broderick, 1 P. Wms. 239, recognizes the same rule. See Re Colman * 3 Curt. 118; Re Ellis, 2 Curteis, 395; Re Newman, 1 Curteis, 914; Norton *v.* Bazett, 1 Deane & Swab. 259; 3 Jur. N. S. 1084.

From the cases before cited in this note, it seems plain that it makes no difference whether the witnesses retire beyond the presence of the testator, at his solicitation or for his comfort, or it is done from other considerations wholly. See also, to same effect, Reynolds *v.* Reynolds, 1 Speers, 253.

The testator must either sign or acknowledge his signature in the presence of the witnesses, and the witnesses must sign in the presence of the testator. Butler *v.* Benson, 1 Barb. 526; Rucker *v.* Lambdin, 12 Sm. & M. 230; Boldry *v.* Parris, 2 Cush. 433. But presenting the instrument to be witnessed, is sufficient acknowledgment of the signature, and of its being executed by the testator. Denton *v.* Franklin, 9 B. Mon. 28. See also, High Appt., 2 Doug. (Mich.), 515.

And it was held, in Sturdivant *v.* Birchett, 10 Grattan, 67, that where the witnesses wrote their names in an adjoining room, where the testator could not see them, and immediately took the will, open in the hand of one of them, to the tes-

* 6. Lord *Ellenborough*, Ch. J., here lays down the rule, that it is "not necessary the devisor should actually see. In favor of

tator, and said, "here is your will witnessed," pointing to the names, and all being present, this was a substantial subscribing of their names in the presence of the testator, two judges dissenting. This was not perhaps strictly in conformity with the English decisions upon the subject, inasmuch as they do not allow the witnesses to a will to adopt a signature made by them at another time. And it might be said, if the witnesses were allowed to carry the will out of the testator's sight, there might be an opportunity for substituting another paper. But this would prove too much. It would seem to prove, that after the paper had once been out of the testator's sight, he could never know it was the same paper which was returned to him, which would be absurd. The truth is, that if this will, after being returned to the testator, and recognized by him as his will, could not receive such an attestation as to become a valid will, it must involve the absurdity, that if the testator allowed the paper, which he had once made, or caused to be made, as the expression of his will, to go out of his sight, so that he could not be certain of no substitution of another paper in its stead, and that by ocular demonstration; no subsequent recognition would enable him to make it the expression of his will. And that is the only question involved in the last case, except that of the witnesses adopting their signatures, made at another time, as a present attestation, in both of which points the decision seems to us the only sensible view which can be taken of the subject.

In Ruddon *v.* M'Donald, 1 Bradf. Sur. Rep. 352, it is held, that it is not indispensable under their statute, that the signatures of the subscribing witnesses should be affixed when the witnesses are literally in the presence of the testator. But in Brooks *v.* Duffield, 23 Ga. 441, it was held, that the witnesses subscribing in the same room, was not sufficient, if the testator was in a part of the room where he could not see them, although hindered only by a door-shutter intervening between himself and the witnesses. But see Hill *v.* Barge, 12 Ala. 687. An attestation in the same room was held presumptively in presence of the testator. Howard's Will, 5 Moore, 199. But where the subscription was in an adjoining room, the testator lying in bed, the intervening door being open, and the testator seeing the backs, but not the hands, of the witnesses, it was held insufficient. And in Moore *v.* Moore, 8 Grattan, 307, the court were equally divided upon the question whether the attestation, being in an adjoining room, where the testator might have placed himself in a position to have seen them, but not having done so, was sufficient. In general, such an attestation is held insufficient in the English courts. But see Wright *v.* Lewis, 5 Rich. 212, where the attestation is held sufficient, if the testator might have seen it. But it must be admitted, the distinctions upon this point are more nice than wise, and do not seem to be founded upon any intelligible principle, unless we say, that in every case where the testator might have witnessed the attestation, without leaving the room, and by the mere act of volition, it shall be regarded as a valid execution. But that where there is any physical impediment to his witnessing the attestation, while he remains in the room, the attestation is not valid. The cases will hardly range themselves under this distinction, perhaps. It seems to be required, that the testator should have been in a position, where, by the mere act of volition, he could have witnessed the attestation. And if so, it will

* attestation, it is presumed if he might see, he did see." But the rule requires that the witnesses should be actually within the * range of the organs of sight of the devisor. And where the devisor "cannot by possibility see the act doing, that is out of his presence." "If the jury had not negatived the testator being in a situation that he might have seen the attestation, I should have had great doubts on this case."

7. In some of the American cases, it seems to be considered, that the rule by which the attestation is held to be in the presence of the testator, where it was such that the testator might have witnessed it, is only a prima facie presumption of fact, liable to be defeated by proof, that the testator did not in fact see the attestation.[7] This is the language of Mr. Justice *Dewey*, in the case last cited: "It being held," says the learned judge, "sufficient evidence of the presence of the testator, if the facts show a possibility of his seeing the witnesses subscribe their names, unless controlled by other evidence, showing that in fact he did not see them, and that therefore it was not done in his presence." But the English cases treat the presumption of the execution being in the presence of the testator, if so that he might have observed it, as one not liable to be rebutted by evidence, that he did not in fact see it witnessed.[8]

8. But if the testator be unable to move without assistance, and have his face turned from the witnesses, so that it is out of his power

be prima facie, and most of the cases say, conclusive evidence, that he did see the attestation of the witnesses, which is the same point we reached in examining the English cases. Watson *v.* Pipes, 32 Miss. 451. See also, Tyler *v.* Mapes, 19 Barb. 448. Where the testator lay in bed in a room adjoining that in which the witnesses signed, but so that he could see them all but the arm and hand while writing their names, which was hid from him by their bodies, it was held that, it being presumable that he might have seen and identified the paper, while the witnesses signed it, the attestation by them was sufficient. Nock *v.* Nock, 10 Gratt. 106. And in a case where the facts were almost identical with the last case above, except that the testator could not see and identify the paper attested, it was held not to be a valid attestation. Graham *v.* Graham, 10 Ired. 219. See also, Boldry *v.* Parris, 2 Cush. 433, where it was held, that two of the witnesses subscribing their names in a room connected with the one where the testator was by an intervening room, but not in his presence, hearing, or view, was not a compliance with the statute. By the statute in Arkansas, it is not required that the witnesses sign in the presence of the testator, if present in court. Will of Cornelius, 14 Ark. 675.

[7] Dewey *v.* Dewey, 1 Met. 349; Hogan *v.* Grosvenor, 10 Met. 54.

[8] Casson *v.* Dade, 1 Br. C. C. 99; Lord *Ellenborough*, in Doe d. *v.* Manifold, 1 M. & S. 294.

to see them, if he wished to do so, the attestation is insufficient.[9] And where the testator is blind, it was considered * sufficient if the testator was where he might have seen the witnesses if he had not been deprived of his eyesight.[10]

9. The courts in such cases adopt the ordinary presumptions of fact, which conform to the natural and ordinary course of events. As, if the question arises, in what part of a room the witnesses subscribed the attestation of a will, it being possible for the testator to have seen them from one part of the room, but not from that part where the table ordinarily stood, and where, in consequence, it would have been most natural for the witnesses to have affixed their names ; it was held, that if it had appeared that the testator, or any of the parties concerned in the execution of the will, knew that it was necessary that the same should be attested in the presence of the testator, that would have been a circumstance upon which the jury might have come to the conclusion, that the table had been removed from its usual place, or that some other proceeding had been taken, in order that the attestation might be made in such a way as to comply with the requisitions of the law. But in the absence of such evidence no such presumption could be made, either by the jury or the court.[11]

10. It seems to be conceded that the Revised Statutes of New York do not require the witnesses, in terms, to attest or subscribe the will, in the presence of the testator.[12] It seems to us, therefore, that the construction adopted by the surrogate in Rudder *v.* McDonald,[12] that the provisions of the Revised * Statutes embrace all the statutory requirements upon the subject, is the one likely to prevail in that state, and that all which the courts of that state will finally consider as indispensable is, that the subscribing witnesses

[9] Tribe *v.* Tribe, 1 Rob. 775 ; 13 Jur. 793 ; 7 Notes Cas. 132, 1 Jarman ed. 1861, 82.

[10] Re Piercy, 1 Rob. 278 ; 4 Notes Cas. 250.

[11] Winchilsea *v.* Wauchope, 3 Russ. 441–444, 445. The cases are very numerous in the American states in regard to the point, what will constitute a sufficient presence of the testator at the time of the attestation by the witnesses, but we should not deem it proper to insert them here in such detail as to give the point of each ; and without that, they would be of no benefit, since a mere digest of the cases is proper to be looked for in the books, prepared exclusively for that purpose.

[12] *Hand*, J., in Butler *v.* Benson, 1 Barb. s. c. 534, 535 ; Ruddon *v.* McDonald, 1 Bradf. Sur. Rep. 352.

should sign the attestation at the same time with the execution by the testator, in whatever mode that be finally done, either by signing, or acknowledging his signature, and declaring it his will; and that it is not requisite that the subscribing witnesses should strictly and literally sign their names in the presence of the testator.[13]

11. It was accordingly held, that if they sign in an adjoining hall, out of the sight of the testator, it is sufficient, though it must be done at the time of the execution or acknowledgment, and with the knowledge and consent of the testator.[14]

12. In Georgia, the testator must have been in such a position as to be able to see the witnesses sign, to constitute presence.[15] And where the witnesses did not sign in the same room where the testator was, it raises a presumption that it was not in his presence, but if the jury find that he might have seen it, and knew it was going on and approved it, it is good.[16]

13. In Vermont, and some other states, perhaps, the statute requires the attestation of the witnesses to be in the presence of the testator, and of each other, but it is there held, that all which is requisite to constitute such presence is, that the testator and the witnesses should all be in the same room for the purpose of executing the will, and that each has an opportunity to witness the execution of the will by the others, if he choose to turn his eyes in that direction.[17]

*SECTION VI.

COMPETENCY OF WITNESSES TO WILL. — INSTRUMENT COMPOSED OF DIFFERENT PARTS, ONE ATTESTATION. — PAPERS MADE PART OF THE WILL BY REFERENCE. — WILL UNDER POWER. — IMPEACHMENT OF WITNESSES.

1. The statute of frauds required witnesses to be credible, which means competent.
2. The time when witnesses are required to be competent.
3. It seems to be considered that this is required, at the time of attestation.
4. One does not become a witness, in the strict sense, until called to testify.
5. The witnesses to a will do, in effect, if not in form, testify at the time of subscribing.

[13] Ruddon *v.* McDonald, 1 Bradf. Sur. Rep. 352.

[14] Lyon *v.* Smith, 11 Barb. 124. And the statutes in some of the other states also dispense with the actual presence of the testator at the time of attestation by the witnesses. See Rev. Stats. of Ark. and New Jersey.

[15] Reed *v.* Roberts, 26 Ga. 294.

[16] Lamb *v.* Girtman, 26 Ga. 625; Watson *v.* Pipes, 32 Miss. 451.

[17] Blanchard *v.* Blanchard, 32 Vt. 62.

6. There is more propriety, therefore, in requiring them to be competent at that time.
7. An executor, or devisee, in trust, not thereby rendered incompetent.
8. The English statute has removed these disabilities. Husband and wife.
9. An executor may be rendered incompetent by official commissions.
10. Further disabilities of the executor considered.
11. The heir is always held to be in by descent, unless he take a different estate by devise.
12. There is no need of more than one attestation, where the will is made and signed at different times.
13. But this rule will not apply to the will and a codicil.
14. Any paper may be so referred to as to become part of the will.
15. But the paper must be clearly identified by the reference.
16. This does not exclude all external evidence.
17. But it must appear clearly that the paper was then in existence.
18. The effect of such reference is to incorporate such paper into the will, and render it a part of the same.
19. English and American cases illustrating the subject referred to.
20. Further illustration of the subject. Case in Surrogate Court, N.Y.
21. An extraneous paper must be clearly referred to in order to make it part of the will.
22. The paper must be identified beyond reasonable doubt.
23. The reference to the unattested paper, and parol evidence, must leave no doubt of identity.

n. 38. Extensive reviews of the cases on this point.

24. The mode of proof of wills claimed to be forged, considered.
25. Subscribing witnesses not impeachable by their declarations, unless examined.
26. Wills under power require the same proof and the same construction as others.
*27. Appointments under power may be made by valid will executed in foreign country.
28. And the will must contain all the requirements of the power, although not otherwise necessary, as that it be under seal.
29. Power of appointment among testator's relations not executed by general will.
30. How far a power may be well executed by general bequest.
31. Power to appoint among a class must embrace all.
32. Will bequeathing all testator's estate good execution of power.
33. Recent case in Connecticut different.
34. General bequests operate under power.

*§ 21. 1. THE statute of frauds required the witnesses to be "credible," which has been construed to include all such persons, as, at the time of the execution of the will, or of giving testimony, were not rendered incompetent to give testimony, by reason of infancy, insanity, or mental imbecility, interest, crime, or any other cause.[1] The grounds of these several causes of * excluding the testimony of witnesses, in courts of justice, require no formal discus-

*[1] The statutes, in some of the American states, define the qualification of the witnesses to wills. Gen. Stats. Mass. ch. 92, § 6. "If the witnesses are competent, at the time of attesting the execution of the will, their subsequent incompe-

sion here, that subject falling more appropriately within the scope of a general treatise upon evidence.[2]

tency, from whatever cause it arises, shall not prevent the probate and allowance of the will." See also, 1 Jarman, ed. 1861, 65, 82.

In Wyndham *v.* Chetwynd, 4 Burns' Eccl. Law, 77, 80, S. C. 1 Burrow, 441; post pt. 2 § 3. Lord *Mansfield* goes into an elaborate argument, to show that the word "credible," in the statute, is a word of course, and has no meaning. But in Hindson *v.* Kersey, id. 85, Lord *Camden*, Ch. J., C. B., seems to have adopted a view, which, although coming to nearly the same result, puts it upon more just grounds. He says, in answer to the inquiry, what is meant by *credible* witnesses? "I answer in one word, they are *competent* witnesses, and no other."

His Lordship here proceeds to argue the question: "At what time must the witnesses be endued with the qualification?" in a manner which ought to be satisfactory to all, and which has been extensively adopted by text-writers, but we are not sure that it is really the law, at the present moment, but we are quite sure it ought to be. "I say," says the learned chief justice, "that they must be clothed with it, at the time of attestation. And here I must premise one observation, That there is a great difference between the method of proving a fact, in a court of justice, and the attestation of that fact, at the time it happens. These two things, I suspect, have been confounded. Whereas it ought always to be remembered, that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the statute is the attestation; the method of proving this attestation, stands, as it did, upon the old common-law principles. Thus, for instance, one witness is sufficient to prove, what all the three have attested. . . . This we see in common experience; for after the first witness has been examined, the will is always read. . . . What is the clause of attestation, but a description of those solemnities which are to attend the execution? among which the presence of credible witnesses is made necessary. It is admitted, that if any other description had been added to the witnesses, that must have belonged to them at the time; as if three Englishmen, or three full-aged persons had been required; these adjuncts would have been necessary at the time, and if so, I see not by what rule of construction one epithet, or adjunct, can be distinguished from another. Nay, if the word *credible* be expunged, and the word *witness*, as it is admitted, doth of itself include *competent*, still competency must be essential to the witness at the time of execution."

The same point has been decided in the same way in some of the American states. Hawes *v.* Humphrey, 9 Pick, 350; Haven *v.* Hilliard. 23 Pick. 10; Taylor *v.* Taylor, 1 Rich. 531; Warren *v.* Baxter, 48 Maine, 193; Carlton *v.* Carlton, 40 N. H. 14. It is said here, that a person under fourteen years of age is presumptively incompetent, from defect of understanding, to attest the execution of a will, but this presumption may be removed. See also, Amory *v.* Fellowes, 5 Mass. 219; Sears *v.* Dillingham, 12 Mass. 368; Bacon *v.* Bacon, 17 Pick. 135; Cornwell *v.* Isham, 1 Day, 35 note; Eutis *v.* Parker, 1 N. H. 273; Workman *v.* Dominick, 3 Strobh. 589; Rucker *v.* Lambdin, 12 Sm. & M. 230; Allison *v.* Allison, 4 Hawks. 141; Hall *v.* Hall, 18 Ga. 40.

[2] Wyndham *v.* Chetwynd, 4 Burns, Eccl. Law, 77.

2. But the period of this competency, and the effect of removing incompetency, it may not be out of place to consider briefly. The witnesses must be competent, either at the time of attestation, or at the time of probate, most unquestionably, but it does not seem clear that competency, at both periods, can be required. And upon general principles of analogy, it may be said, that the qualifications of a witness are only to be considered and determined, with reference to the time of his being called to give testimony. But the case of a will is considered to be different, in some respects, from the ordinary case where, if the witness is admissible when sworn, it is sufficient, inasmuch as the will is required to be subscribed and attested by "three or four *credible* witnesses." This, naturally, imports the quality or character of the witness, at the time of the attestation.

3. There can be no question, we think, from an examination of the decided cases, and a fair consideration of the principles * involved, that much still remains to be said in favor of the view maintained by Lord *Mansfield*,[2] that competency of the witnesses to a will, at the time of probate, is all that can be required, notwithstanding the great force of the argument of Lord *Camden*, in the opposite direction, and the general acquiescence of the text-writers in the adoption of these views.

4. It is certain, no such qualification of witnesses has ever been required in regard to any other subject. One, strictly speaking, does not become a witness, until sworn, and giving testimony. All men have the competency to become witnesses, with few exceptions; but they are not such, in fact, until called to give testimony. And although a person, called to observe a fact, with a view to remember it, and attest it, when needful, is in a general way called a witness of that fact; and the same is true in regard to the witnesses called to attest the execution of a deed, or a will, it is only true, in a qualified sense, that they are witnesses, until called to give testimony.

5. But it is true, that the witnesses to a will are expected, of necessity, sometime, to give testimony. That is an act which has no validity until established in court, and this can only be done by the testimony of the persons selected by the testator. There is, therefore, the more propriety in requiring such persons to possess competency, at the time of attesting the act;[3] since * the judg-

[3] The witnesses to a deed are in a situation entirely different from those to a

ment and opinion of the witness, formed at the time, and from observations then made, much of which could not be perfectly recalled, so as to enable the witnesses to rejudge that question, after the removal of any disability existing at that time, is to become testimony. So that, for all practical purposes, the witness who was not competent, at the time of attesting a will, and forming his opinion of the competency of the testator, could not, practically, become any more competent, by the removal of any existing disability. And it seems to be conceded upon all hands, that, if the witnesses are competent at the time of attestation, the will remains valid, although any number of them may be rendered incapable of giving testimony at the time of probate by reason of supervening disabilities.[4]

6. Hence, Mr. Greenleaf[5] lays down the rule, that the witnesses to a will must be competent to testify at the time of execution, or the instrument is invalid; since "The *attesting witnesses* are regarded, in the law, as persons placed round the testator, in order that no fraud may be practised upon him, in the execution of the will, and to judge of his capacity." But in a later case than

will. In the former case, the instrument becomes operative immediately upon its execution, and it is not by any means matter of course, the witnesses will ever be called upon to give testimony. Nor do they sign, to attest any particular fact, beyond the mere execution of the instrument. But in the latter case, the subscription is merely provisional, and the instrument can have no operation except through the testimony of the witnesses; and this testimony must extend beyond the mere fact of execution, and include the opinion of the witness, that the testator was, at the time, of sound disposing mind and memory, and free from the influence of any extraneous compulsion or constraint. The subscribing witnesses to a will do, therefore, begin their testimony from the very time of attestation, which is consummated only at the probate of the instrument.

[4] Amory *v.* Fellowes, 5 Mass. 219, 229.

[5] 2 Greenleaf, Ev. § 691. But the only English cases cited by this writer, are Brograve *v.* Winder, 2 Ves. Jr. 634, 636, and Anstey *v.* Dowsing, 2 Strange, 1253, 1255. Brograve *v.* Winder, only establishes the proposition, that if the witness be competent at the time of attestation, any subsequently acquired incompetency will not avoid the instrument, and it is here held, the witness may prove the execution of the will and the competency of the testator, notwithstanding a subsequently acquired interest, which at that time was good ground of exclusion. But this does not decide, how far a will attested by incompetent witnesses could be established by removing such incompetency. But Anstey *v.* Dowsing, does decide the very point, but was carried into the Exchequer Chamber, 1 W. Black. 8, and after being argued at length, was compromised, so that the case was never finally decided.

Anstey *v.* Dowsing,[6] it is expressly decided, * that a witness to a will, who is a legatee under it, may become competent to prove the same by releasing such legacy. But these cases gave rise to the English statute, (25 Geo. II. ch. 6,) which provided, that if any person should attest any will or codicil, to whom any beneficial devise, legacy, &c., was given, such interest or estate, as to the person attesting the will only, or any one claiming under him, should be absolutely void, and such person should be admitted as a witness: and creditors, whose debts are charged on real estate, are by the same statute also made competent. A similar statute exists in many of the American states.

7. Under this statute, it has been decided, that its provisions do not extend to an executor or devisee in trust.[7] The operation of the statute is so sweeping, that it seems it will render void any beneficial interest of any one under the will, who is a witness, although there may be other witnesses, sufficient in number to meet the requirements of the statute.[8] An interest * in the wife, as

[6] Lowe *v.* Joliffe, 1 W. Black, 365. The case of Goodtitle *v.* Welford, Doug. 139, is cited 1 Jarman, Eng. ed. 1861, as being an authority to the same effect; but it does not appear, in the report of that case, that Hearle, the witness, offered to prove the sanity of the testator, was one of the subscribing witnesses, and from that circumstance not being urged, on either side, it is, perhaps, fairly to be inferred, that such was not the fact. Some of the late American cases adhere to the rule, as laid down by Prof. Greenleaf. Patten *v.* Tallman, 27 Me. 17; Warren *v.* Baxter, 48 id. 193. The Revised Statutes of Maine use the word "disinterested" to express the requisite quality of the witnesses to a will, which is said by the court thus to be used to designate such as are not "interested," and to prevent changes in the law of evidence applying to their attestation. Jones *v.* Larrabee, 47 Me. Rep. 474. Under this statute, it seems, it must be a definite legal interest to disqualify the witness. Warren *v.* Baxter, supra.

[*7] Lowe *v.* Joliffe, 1 W. Black. 365; Fountain *v.* Coke, 1 Mod. 107; Goodtitle *v.* Welford, Doug. 139; Bettison *v.* Bromley, 12 East, 250; Phipps *v.* Pitcher, 6 Taunt. 220.

[8] Doe d. *v.* Mills, 1 Moody & Rob. 288; Wigan *v.* Rowland, 11 Hare, 157; s. c. 21 Eng. L. & Eq. 132. This last case was one of considerable hardship. The present English statute requires but two witnesses. In this case, two witnesses had signed, as marksmen. Then a line being drawn below the two signatures, and to the left, the word "witnesses" is written, and then follows the names of the testator's two sons-in-law. One of them swore, that he signed as the witness to the signatures of the marksmen, the other, that he signed as an additional witness to the will. It was argued, that as the reason for the legacy being declared void had ceased, in the removal of all disability of witnesses, by reason of interest, the law itself should be held of no effect. But Vice-Chancellor *Wood* said: "The rule, however, is on the statute book, and I must adhere to it. I do not think

it seems, will disqualify the husband as a witness, to the extent of the wife's interest.[9]

8. The present English statute has removed all these disabilities of witnesses to a will, in different ways.[10] It has been decided in the American states, that, if either a husband or wife be a witness to a will, containing a bequest to the other, such bequest is void, and the witness competent.[11]

9. The proposition of the competency of an executor to be one of witnesses of the will, seems to be well settled in the American states.[12] But where the executor is entitled to * commissions upon

it will ever be repealed, as to that." The learned judge doubted, whether one whose name appeared on the face of a will as a witness, could be permitted to show that he did not sign, as a witness, where the signature was genuine. But said, if that were so, the testimony left the matter too doubtful here for him to act upon it.

But in many of the American states, the statute only renders the estate of witnesses to a will, who take a beneficial interest under it, void to the extent of the number required to give validity to the instrument. And where supernumerary names appear upon the paper, as witnesses, those will first be taken, to complete the requisite number, who take no benefit under the will.

In New York and some other of the American states, a devisee or legatee, who is a witness, and would be entitled to claim part of the property, if the will had not been made, may recover to that extent, of the devisees, or legatees. 1 Jarman, Perk. ed. 108, 109. And in Connecticut, this provision of rendering void the devise or legacy of a witness to the will, only extends to such as are not heir at law. This rule prevails here by construction of their statute. Fortune *v.* Buck, 23 Conn. 1.

[9] Hatfield *v.* Thorp, 5 B. & Ald. 589; Anstey *v.* Dowsing, 2 Strange, 1253.

[10] § 14, provides, that if the will shall be attested by a witness who is incompetent at the time, or any time thereafter, such will shall not, on that account, be invalid. § 15, is much like the provisions of 25 Geo. II. ch. 6. § 16, removes all disqualifications from creditors, whose debts are made a charge upon the real estate. § 17, removes all disqualification on account of being executor of the will.

[11] Jackson *v.* Woods, 1 Johns. Cas. 163; Jackson *v.* Durland, 2 Johns. Cas. 314; Winslow *v.* Kimball, 25 Me. 493. But see, Fortune *v.* Buck, 23 Conn. 1, where this is questioned, but the case is decided upon other grounds.

[12] Orndorff *v.* Hummer, 12 B. Mon. 619; Rucker *v.* Lambdin, 12 Smedes & Marshall, 230; Murphy *v.* Murphy, 24 Mo. 526; M'Donough *v.* Loughlin, 20 Barb. 238; Comstock *v.* Hadlyme, 8 Conn. 254; Den *v.* Allen, 1 Pennington, 35; Coalter *v.* Bryan, 1 Grattan, 18; Henderson *v.* Kenner, 1 Rich. 474; Overton *v.* Overton, 4 Dev. & Batt. 197; Sawyer *v.* Dozier, 5 Iredell, 97; Daniel *v.* Proctor, 1 Dev. 428; Millay *v.* Wiley, 46 Me. 230; Jones *v.* Larrabee, 47 Me. 474; Meyer *v.* Fogg, 7 Florida, 292. A legatee, who is called to establish a will against his own interest, he being one of the heirs at law, may testify. Clark *v.*

the estate, so far as personal property is concerned, it has been decided, that an interest is thereby created, which renders him incompetent.[13]

10. And even the liability of the executor for the costs of the trial, have been held sufficient interest to exclude him from giving testimony, either as to the execution of the will, or the sanity of the testator.[13] But the will is nevertheless valid, such witness being competent at the time of attestation, and may be proved by the other witnesses.[14] And the renunciation by the executor, of all trust under the will, restores him to the same condition as if he had not been named trustee under the will.[15] But it is held in one case, that such renunciation does not remove all objection to the testimony of the wife of such executor or trustee, which must rest upon the ground of some remaining disability in the husband.[16]

11. By the English law, where one takes the same interest under a devise, which he would as heir, he is held to be in by descent and not by purchase, and it has been held, that neither the imposition of a pecuniary charge, or of an executory devise,[17] * will have the effect to put him in by devise. But if the estate created

Vorce, 19 Wend. 232. The next of kin may be rendered competent to prove a will by an assignment of the interest, to which he would otherwise be entitled. Deakins *v.* Hollis, 7 Gill & J. 311. The judge of probate is a competent witness. 1 Root, 462; 2 id. 232. See also Patten *v.* Tallman, 27 Me. 17; Richardson *v.* Richardson, 35 Vt. R. 238.

[13] Taylor *v.* Taylor, 1 Rich. 531; Workman *v.* Domminick, 3 Strobh. 589; Tucker *v.* Tucker, 5 Ired. 161; Morton *v.* Ingram, 11 Ired. 368; 3 Jones, Law, 441; 20 Barb. 238. But see, Meyer *v.* Fogg, 7 Florida, 292. And the same was decided in Burritt *v.* Silliman, 16 Barb. 198. But in M'Donough *v.* Laughlin, 20 Barb. 238, this decision is disapproved; and it was held the executor, under such circumstances, is a competent witness to the will.

[14] Sears *v.* Dillingham, 12 Mass. 358; Van Sant *v.* Boileau, 1 Binney, 444; Snyder *v.* Bull, 17 Penn. St. 54.

[15] Burritt *v.* Silliman, 3 Kern. 93; Dorsey *v.* Warfield, 7 Md. 65.

[16] Huie *v.* M'Connell, 2 Jones, Law, 455. Persons interested merely as trustees, are competent witnesses to a will. Malloy *v.* M'Naire, 4 Jones, Law, 297; Peralta *v.* Castro, 6 Cal. 354. Where the husband releases to the executor a legacy to his wife, he is thereby rendered a competent witness in favor of the will, Weems *v.* Weems, 19 Md. R. 334.

[17] Hainsworth *v.* Pretty, Cro. Eliz. 833, 919; Clerk *v.* Smith, 1 Salk. 241; Chaplin *v.* Leroux, 5 Man. & Sel. 14; Doe *v.* Timins, 1 Barn. & Ald. 530; Maubridge *v.* Plummer, 2 My. & K. 93; Allen *v.* Heber, 1 W. Bl. 22; Emerson *v.* Inchbird, 1 Ld. Ray. 728; Hunt *v.* Earl of Winchelsea, 1 Burr. 879; s. c. 1 W. Bl. 187.

by the devise is essentially different from that by descent, as where the devise creates only a life estate, with remainder over, after the decease of the heir, he must be held to take by the will.

12. As it is well settled, as before stated,[17] that one attestation is all that is necessary, even where the will consists of several sheets of paper, provided every part of the instrument be in the room at the time of the attestation;[18] so if the will consists of several clauses, written at several different times, as where an illiterate man drew up and wrote upon part of a sheet of paper, several devises and bequests, which he subscribed, but did not have it witnessed, and subsequently added a further memorandum on the same paper, also subscribed in the presence of three witnesses, and in their presence declared it to be his last will, and desired them to attest it, as such, which they did; it was held a good devise of real estate.[19]

13. But the reasoning of the judges in these last cases, seems to indicate, that the same rule could not be extended to the attestation of a codicil, unless where the codicil, in terms, refers to the will and sets it up.[20] And it has been decided, that the attestation of the will before two witnesses, and the codicil before two, at different times, will not render either a valid * devise of real estate under the Statute of frauds.[21] But it has been said, that if it appear that the codicil is intended to set up the will, it may have that effect by supplying an additional witness to the attestation.[22]

[18] Ante, 118, pl. 8; Bond *v.* Seawell, 3 Burr. 1773.

[19] Carleton d. *v.* Griffin, 1 Burr. 549. In the last addition to the paper, there was an express declaration, that the testator did "not thereby mean to disannul any part of his former devise and disposition." It appeared, that when he made the former portion of the will, he did not know that witnesses were necessary, but afterwards learning that fact, he made a subsequent disposition, by reattesting the same in the presence of the witnesses, and publishing it, as his will, and requesting them to attest it as such.. And in a very recent case, Cattrall in re. 10 Jur. N. S. 136, where the testator wrote his will upon the first and half of the second side of a sheet of paper, and duly executed the same. Then followed the appointment of an executor. A space and a line intervened, and then followed a different disposition, in some respects, and a formal execution. Held, as there was nothing to rebut the presumption, that the testator intended the last execution to extend to all that preceded it, the appointment of executor was rendered valid.

[20] Jarman, ed. 1861, 83.

[21] Lea *v.* Lib, 3 Salk. 395.

[22] 1 Jarm. ed. 1861, 83; Bond *v.* Seawell, 3 Burr. 1775

The effect of codicils, in this respect, will naturally come under consideration hereafter.

14. Any paper may be so referred to as to become a part of the will, and make it necessary to refer to the paper, in order to ascertain the real intention of the testator in the disposition of his estate. As where one devises lands, as conveyed to him by persons named, it can only be known what lands are intended, by reference to the deed. The rule is thus laid down, in an important case, by a learned and cautious judge:[23] "I believe it is true, and I have found no case to the contrary, that, if a testator in his will refers expressly to any paper already written, and has so described it, that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will: and such reference is the same as if he had incorporated it." . . . . "But the difference between that case, and a relation to a future intention, is striking. In the former, there is a precise intention mentioned, at the time of making the will, as the paper makes out the intention at the time." But where a man sets up, or attempts to set up, a paper, by his will, which he is to execute thereafter, it is the paper which expresses the future will, and not the will expressing the present intention, through the existing paper.

15. But there must be no reasonable question of the identity of the paper, and of its existence, at the date of the will.[24] For * this purpose it is commonly required, that the substance of the paper should be so far described in the will, as to make it intelligible, without relying upon the paper for any material matter of substance, or that the paper should have been shown to some one before the execution of the will, or else a memorandum be indorsed by the testator, upon the paper, as "this is the paper referred to in my

[23] Mr. Justice *Wilson*, sitting with Lord *Loughborough*, in Habergham *v.* Vincent, 2 Ves. Jr. 204, 228; Molineux *v.* Molineux, Cro. Jac. 144.

[24] Dillon *v.* Harris, 4 Bligh, N. S. 329. In this case the testator referred to a paper in the handwriting of the devisee, and which the testator stated he had * placed in the hands of his executors. A paper was found in the testator's possession, in the handwriting of the devisee, but it was considered as not sufficiently identified, as that referred to by the will, since the devisee might have written several similar papers. If the paper be minutely described in the will, or its character so identified, as to leave no reasonable doubt of its being the same, and if it be referred to as a paper then in existence, it will be assumed such was the fact, in the absence of circumstances leading to a contrary conclusion. Re Hunt, 2 Rob. 622.

will," or similar words, and this should be shown to have been made before the execution of the will.[25]

16. And where there is a reference to the extrinsic paper, or document, by such terms as make it capable of identification by means of parol evidence, such testimony is admissible for that purpose. As where a codicil began, "This is a codicil to my last will and testament," and it was shown, by extrinsic evidence, that no other document had been found to answer the description.[26] And where a document, headed "Instructions for the will of J. Wood," disposed of the residue "in such manner as the testator should direct by his will to be indorsed thereon," and the testator afterwards made a will, expressed to have been made in pursuance of "instructions," although not indorsed upon them, it was held, that as no other "instructions" were found, these were incorporated into the will.[27]

17. But if the paper be described in the will as "made, or to be made," this will be regarded as a circumstance strongly * indicating its non-existence at the time.[28] The paper, although written after the will, may be regarded as incorporated into it, where the will is republished by a codicil executed after the execution of the paper.[29]

[25] 1 Jarman, ed. 1861, 84; Re Countess of Durham, 3 Curt. 57; Re Dickens, 3 Curt. 60; Re Willesford, 3 Curt. 77; and other cases here cited.

[26] Allen *v.* Maddock, 11 Moore, P. C. C. 427.

[27] Wood *v.* Goodlake, 4 Monthly Law Mag. 155; 1 Notes Cas. 144.

[*26] 1 Jarman, ed. 1861, 85, and cases cited; Re Countess of Pembroke, 1 Swab. & Trist. 250; s. c. 2 Jur. N. S. 526.

[29] Re Hunt, 2 Rob. 622. Stewart in re. 3 Sw. & Tr. 192. This subject is extensively discussed by Dr. *Lushington*, in Sheldon *v.* Sheldon, 1 Rob. 81; s. c. 8 Jur. 877. The learned judge here concludes, that where an instrument is set up in the will, and which before was invalid, it must be included in the probate of the will and for that purpose the original paper, except under very peculiar circumstances, must be filed in the probate office. 1 Jarman, ed. 1861, 85, 86, and cases cited in the notes. These cases have chief reference to personal property, but as wills, in this country, affecting the title of real estate, are required to be first established in the probate courts of the place of the domicil of the testator, and, when used as evidence affecting the title of real estate in other jurisdictions, must first be filed in the probate courts of that jurisdiction, which, by the statutes of most of the American states, has the same effect as the probate of the original will; the English cases affecting the probate of wills of personalty will form precedents, involving principles analogous to those affecting the probate of wills of real estate here.

The testatrix directed, in her will, that her interests should be divided, "as I shall direct in a small memorandum." She afterwards wrote a memorandum of

But where the testator, in executing a codicil to his will, referred to a former codicil, which had been prepared by his solicitor and forwarded to him, and which he supposed he had executed, as being duly executed, and expressly confirmed the same, as a duly executed codicil, but which was found, after the testator's death, tied up in a parcel containing the will and five other codicils duly executed, it was held, that the draft codicil was not sufficiently identified as the paper intended to be referred to, and could not be admitted to probate.[30] It is said in a very recent case, that, to incorporate an unexecuted paper as a portion of the will, it must be so described in the will as to leave no doubt in the mind of the court, that it is the paper referred to.[31]

18. The effect of a reference, in a duly executed will, to an extraneous paper, in "incorporating" that paper into the will, so as to make it, ipso facto, a portion of the will itself, is a highly important point to be borne in mind, in determining all questions connected with the mode of procedure, in the probate of the will, under such circumstances. The cases already referred to, show, very clearly, that a will, required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. And this is true of others, soon to be referred to, many * of which were decided during the existence of statutes requiring such formalities, so that we cannot escape from the force of these cases by supposing they had reference, exclusively, to wills of personal estate, where no particular formalities were required under the earlier English statutes.[32] This

trinkets, headed, "memorandum of trinkets referred to in my will." Subsequently she executed a codicil which did not confirm the will, or refer to the memorandum. It was held, the memorandum could not be included in the probate. Mathias in re, 9 Jur. N. S. 630; 3 Swab. & Trist. 100.

[30] Allnutt in re, 3 Sw. & Tr. 167.

[31] Brewis in re, 10 Jur. N. S. 593. The will was here executed upon the first side of a sheet of paper, by which the testator directed his property to be divided, after the death of his wife, among his children, "in the manner hereinafter named;" and on the second and third sides of the sheet followed several absolute bequests to the children: but these portions of the writing were not signed by the testator or by the witnesses; and although written by his dictation, and read over to him before the will was executed, were not seen by the witnesses, and it was held, they could not be regarded as so incorporated with the will as to form part of the probate. A mistaken reference to an extraneous paper may be set right by construction, with the aid of extrinsic proof. Whatman in re, 10 Jur. N. S. 1242.

* [32] 1 Jarman, 83, Eng. ed. 1861. "A testator," says the learned author, "may

"incorporation" of the paper referred to into the will, so makes it a part of the instrument, that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by force of the reference and the consequent incorporation.

19. Thus, in an English case,[33] the testatrix, on the same day of executing the will, gave a promissory note of £350, to persons to whom she desired to make a testamentary gift, under the misapprehension that such note would create a valid debt against her estate. In her will she directed her executor to pay, "particularly the debt of £350 and interest, which I owe to," &c., "and for the the security of the payment of which I have given my promissory note" — "and all other my just debts," &c. Vice Chancellor *Kindersley* held this a good legacy. And where the testator gave his son a promissory note for $1,000, in consideration of his releasing all interest in his estate, and in his will the following was said in reference to such note: "I have given my son $1,000, by note, for his full part of my estate;" "I also order my executor to pay all the legacies above named," and "I see fit to dispose of my estate, as mentioned in the above will;" it was held to constitute a valid legacy to the son for the amount of the note, although the note itself was invalid.[34] * And in a recent case in New York,[35] it was held, that where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper makes part of the will, although the paper be not subscribed, or even attached. And it was further held, in this case, that the contents of an existing map or writing, so referred to, were to be regarded as incorporated into the will and distributed in it, to the extent of the several references made to it, at the places where made, and thus the contents of the paper to which the instrument refers, will be deemed constructively inserted.[36] It is not requisite there should be physical connection

so construct his disposition as to render it necessary to have recourse to some document, (as to any other extrinsic matter,) in order to elucidate or explain his intention. The document is then said to be incorporated in the will."

[33] Longstaff *v.* Rennison, 1 Drewry, 28; 11 Eng. Law. & Eq. 267.

[34] Loring *v.* Sumner, 23 Pick. 98. A very similar question arose in Wilbar *v.* Smith, 5 Allen, 194, and was ruled the same way.

[35] Tonnele *v.* Hall, 4 Comst. 140.

[36] *Jewett*, J., in Tonnele *v.* Hall, supra, p. 144.

between the parts of a will. It is sufficient if they be connected by the internal sense, or by a coherence and adaptation of parts.[37]

20. And where the will contained a clause disposing of certain assets, according to the terms of a schedule, but was executed without the schedule being annexed, it was held, that whether the schedule was annexed or not, the will was validly executed, having been signed at the end of those testamentary provisions which the decedent intended to incorporate into it.[38]

* 21. Where the testator executed a testamentary disposition on the first side of a sheet of paper, but attested by only one witness, and soon after executed another testamentary disposition on the third side of the same sheet, but which did not in any way refer to the former, it was held, that it was not incorporated into the latter, so as to become a portion of it, and being informally executed, it was of no force.[39] The question is similar where a will is written on several sheets of paper, and the last sheet only executed with the requisite formalities; although the witnesses did not observe the other sheets, the prima facie presumption being that they all formed part of the will at the time of its execution. And where there is evidence, from the provisions and structure of the will, tending to confirm and to rebut this presumption, the question must be determined, as matter of fact, upon the evidence.[40]

22. In order that an unattested paper may be adopted as part of

[37] Wikoff's Appeal, 15 Penn. St. 290. In South Carolina, in Johnson *v.* Clarkson, 3 Rich. Eq. 305, the same principle declared in Habergham *v.* Vincent, 2 Ves. Jr. 204, is adopted. And in Chambers *v.* M'Daniel, 6 Iredell (N. C.), 226, the law is announced almost in the same terms.

[38] Thompson *v.* Quimby, 2 Bradf. Sur. Rep. 449. It is here said by the learned judge, that the testator could not make a disposition of his estate, the force and extent of which depended upon the contents of another paper, and that any portion of the will remaining in that state, "would consequently have been void, even if the schedule had been annexed. But this is probably not consistent with the rule laid down by the Court of Appeals in Tonnele *v.* Hall, 4 Comst. 140, that a paper so referred to, may be regarded as incorporated into the will at the place where it is referred to, and so makes part of the will. We apprehend there is no more difficulty or danger in allowing a will to derive its operation from some existing paper, to be proved by extraneous evidence, than in referring the operation, or construction of the will, in any other particular, to extraneous facts, which have to be proved by extrinsic evidence. One may devise the farm, deeded him by A. B., or the house adjoining that of A. B., and these cases afford fair illustrations of the points, made in reference to independent papers, and are most unquestionable law.

[39] Drummond in re, 2 Swab. & Trist. 8.

[40] Marsh *v.* Marsh, 1 Swab. & Trist. 528; ante, § 18, pl. 8.

a duly attested will, it must be referred to by the will, in such a manner as shall, with the aid of parol evidence, when necessary and properly admissible, leave no doubt of its identity. And where the testatrix enclosed and sealed up in an envelope, two sheets of paper, on which she had written an expression of her wishes, in regard to the disposition of her estate, the papers not being duly executed, but the testator wrote on the inner side of the envelope: "It is my wish for my husband to administer the moneys, and for the smaller bequests, B. will attend to them," which was signed by her, and attested by two witnesses; the only surviving witness deposed, that after the execution of this memorandum, two similar sheets of paper to * those found in the envelope, were placed therein, and sealed up by the testator, but she could not further identify them, the envelope having been opened after the execution; it was held, that as the words in the memorandum did not refer to any paper as then existing, or if so, not in such terms as to enable the court to identify them; and as the evidence did not show that the papers found in the envelope, were the same placed therein, at the time of the execution of the memorandum, the papers were not so far identified as the ones referred to in the memorandum, and as being in existence at the time, as to be entitled to probate, and that without them the paper was not testamentary.[41]

* [41] Straubenzee *v.* Monck, 8 Jur. N. S. 1150. See Allen *v.* Maddock, 11 Moore, P. C. C. 427; Smart *v.* Prugean, 6 Vesey, 560, 565. A letter, giving directions as to one's funeral, and as to the disposition of property, but not duly attested, was afterwards duly executed in the presence of the required number of witnesses, by writing the following words on the outside of the envelope, thus: "I confirm the contents written in the enclosed document in the presence of ——," and it was held sufficient to admit parol evidence to identify the paper, and to entitle it to probate. If the envelope is found sealed, and but one paper is found within, that one must have been the "enclosed document," to which the memorandum refers, and it may receive probate. Sir *C. Cresswell*, J., in Almosnino in re, 6 Jur. N. S. 302. See also Allen *v.* Maddock, 11 Moore, P. C. C. 427. But where the will refers to memoranda, or deeds, or other direction, thereafter to be executed, and the will is confirmed by a subsequent codicil, and the memoranda found tied up with the will and codicil, after the decease of the testator, bearing date after the will, and earlier than the codicil, they cannot be admitted to probate, as part of the testamentary act. Lancaster in re, 29 L. J. Prob. 155. Gift of "some household furniture of which the legatee has a list," if the list, when produced, is headed, "List goods I give to my godson, J. E. F.," who was the son of the legatee, it will not be regarded as sufficiently identified by the description, to become part of the will. Greves in re, 1 Swab. & Trist. 250. The question is extensively discussed by the Judicial Committee of the Privy Council, in Allen *v.* Maddock, supra, where it was

* 23. The general proposition, already stated, that an unattested paper, to become part of the will, must be so referred to, that there

held, that if the paper is in fact sufficiently identified, by the reference, together with the parol proof, it is no objection to its being treated as part of the will, that, by possibility, * circumstances might have existed, in which the instrument could not have been identified.

In Greves in re supra, where the testatrix had executed a will, but not in due form, and subsequently made a codicil, which was properly attested, headed, "This is a codicil to my last will and testament," but which referred to the informal will in no other manner, the same not being present at the time of executing the codicil; the will being found at the testatrix's residence, in a trunk after her decease, in a sealed envelope, indorsed, "Mrs. Anne Foot's will," that being the testatrix's name; the codicil being found in a drawer in her bedroom, and no other will or testamentary paper being found, it was held, that as there was a distinct reference in the codicil to a "last will and testament," and no other had been found, this was sufficiently identified as being the one referred to in the codicil, and although informally executed, it was made part of the codicil by incorporation, and entitled to probate, but the court will not extend this rule beyond the doctrine of Allen *v.* Maddock, supra.

Where a will refers to a deed of settlement for the manner of the devise taking effect, and the trustees of the settlement decline to allow the deed to go into the Probate Court for registry, probate of the will may be granted without reference to the deed, by the consent of those propounding the will. Dundas in re, 9 Jur. N. S. 360. The court will not compel the trustees to bring in the deed, ib. We think the court should do that where it is important to the interest of parties claiming under the will. In another case, where the will referred to a settlement, for the trusts upon which certain leaseholds were devised, the court granted probate, without requiring the settlement to be embodied in the will, upon an affidavit being filed, giving the date, and describing the settlement. Lansdowne in re, 32 L. J. Prob. 121; S. C. 3 Sw. & Tr. 194.

The practice in the American Probate Courts, seems to be not to require an extraneous paper, referred to in a will, to be produced and made part of the probate at the time the will is proved. But the English courts, where it can be done, without bringing other interests in peril, do require the paper to form part of the probate, and to remain on file in the office. We do not regard it as essential to the validity of that portion of the testamentary act, depending upon the extraneous paper, that it should be made part of the probate, since the * paper becomes a portion of the will by incorporation, and may be proved before any tribunal, where the rights under it come in question; but the English practice seems to us the safer and better one, and we should expect it would ultimately be adopted here. See Re Smith, 2 Curteis, 796; Re Dickins, 3 Curt. 60. A mere reference to an annulled will, in connection with the declaration that the testator made no bequest to certain persons, the annulled will containing no bequest to them, but a declaration that they would otherwise be well provided for, and if they were not, he was sure his wife would share her all with them, creates no trust in their favor, and need not be included in the probate. Ouchterlony in re, 32 L. J. Prob. 140; S. C. 3 Sw. & Tr. 175. A list of articles referred to in the will, as thereafter to be

shall be no doubt of its identity, was distinctly recognized in a very late case.[42]

*24. The mode of proof of wills, and the character of the evidence which is admissible to impeach, or countervail the testimony of the subscribing witnesses and others, is very extensively discussed in a late case in New Jersey.[43] It is there held, that the testimony of the subscribing witnesses to the due execution of the will, must prevail, unless impeached, and should not be disregarded, upon proof of the simple improbability of their statement. And where positive proof is attempted to be overcome by negative testimony, the latter should be so complete as to exclude every link in the chain of the former. And upon an issue whether a will is genuine or forged, the circumstances attending its production, and the declarations of the person having the custody of the instrument, during the time of such custody, and especially at the time it was produced for probate, manifesting a design to present it as a genuine will, are admissible, and competent evidence, not upon the ground that

executed, and which is found attached to the codicil of the will, in the handwriting of the testatrix, but not signed by her, cannot be admitted to probate. Warner in re, 10 W. R. 566. And where a codicil refers to two memorandums, and only one is found, that must operate, upon the presumption that the testator destroyed the others animo revocandi, and if not, that the will should be carried into effect as far as it can be. Dickinson *v.* Stidolph, 11 C. B. N. S. 341.

[42] Dickinson *v.* Stidolph, 11 C. B. N. S. 341.

[43] Boylan *v.* Meeker, 4 Dutcher, 274. It was also decided in this case, upon another subject, already discussed, that sanity, being the normal state of the mind, is presumed to exist, unless the contrary be shown; but where insanity is once shown to exist, its continuance is presumed, until the contrary be shown. Ante, § 5, pl. 15, n. 21 et seq. In regard to the proper evidence to establish alterations of an acknowledged genuine will, either by subsequent codicils or interlineations, and the rule for weighing such proof, an important case is reported in 4 F. & F. 1, Cresswell *v.* Jackson, before Lord Chief Justice *Cockburn* and a jury. The issue was whether three codicils, set up by and mostly in favor of the claimant, in whose handwriting it was suggested they were, were genuine; there being also an interlineation in the will in his favor, also suggested to be in his handwriting; the witnesses to the first codicil, denying their attestations, were allowed to be examined adversely; but evidence by comparison of his handwriting and otherwise was received, with a view to show the probability of forgery of their attestations and of the codicils, and the jury were directed that they might find the forgery upon the circumstantial evidence alone, even against the positive testimony of the attesting witnesses; that the onus was upon the party who set up the alterations and codicils against an admitted will to satisfy the jury as to their genuineness; and that, if the evidence left the jury in doubt on that question, they should find for the party who claimed under the will.

* the custodian is a subscribing witness to the instrument, but as part of the res gestæ, and indispensable to show the history of the paper.

25. But it is here held to be the settled law, both in Westminster Hall, and in the American states, that the declarations of a subscribing witness to the will, who is not examined at the trial, and which are not part of the res gestæ, cannot be received to impeach the attestation and due execution of the instrument,[44] and especially is this so when the proof of the attestation by such witness is not offered in the case for the purpose of establishing the will.

26. Wills under a power, must be executed with the same formalities, and receive the same construction, as any other class of wills.[45] And such wills require to be proved the same as any other will. And where it is to operate upon personalty alone, the courts of equity do not allow it to be set up until it has been admitted to probate in the proper court of * probate.[46] And in the proof of such wills, it is common to require the production of the instrument creating the power.[47]

27. But an appointment of personal estate in England, made by a

[*44] Stobarth *v.* Dryden, 1 M. & W. 615. In this case the question arose upon proof of a deed, which bore the attestation of two witnesses, one of whom was dead, and the other denied all recollection of having attested the deed, and doubted the genuineness of his own and the grantor's signature. The handwriting of the grantor and of the deceased witness was then proved, and it appeared that the sum secured was written over an erasure. It was held that the grantor could not give evidence of the declarations of the deceased witness, tending to show that he had forged or fraudulently altered the deed. This question is carefully considered by *Nelson*, Ch. J., in Losee *v.* Losee, 2 Hill, 609, and the conclusion reached, that where proof of the attestation of a deceased subscribing witness is relied upon, evidence of the bad character of such witness is admissible, for the purpose of rebutting the presumption of the due execution of the instrument, arising from the attestation of the witness. The same view is very fully maintained in the very late case of Colvin *v.* Warford, 20 Md. 357, 387. And this view is favored by some other American cases. Crouse *v.* Meller, 10 S. & R. 155; Gardenshire *v.* Parks, 2 Yerger, 23; Vandyke *v.* Thompson, 1 Harring. 109. But the case of Baxter *v.* Abbott, 7 Gray, 71, seems to bear in the opposite direction. In Beaubien *v.* Cicotte, 12, Mich. 459, it was held, that, where the subscribing witness to a will testified to its due execution by a competent testator, evidence of his statement upon another occasion in contradiction of his testimony was admissible by way of impeachment.

[45] Duke of Marlborough *v.* Lord Godolphin, 2 Ves. Sen. 76; Southby *v.* Stonehouse, id. 610; Van Wert *v.* Benedict, 1 Bradf. Sur. Rep. 114.

[*46] Jones *v.* Jones, 3 Mer. 161; Douglas *v.* Cooper, 3 Myl. & K. 378; Stevens *v.* Bagwill, 15 Vesey, 139, 153; Van Wert *v.* Benedict, 1 Bradf. Sur. Rep. 114.

[47] Re Monday, 1 Curteis, 590; Allen *v.* Bradshaw, 1 Curt. 110.

person who died, domiciled abroad, by a will not attested as required by the law of England, but valid according to the law of the testator's domicil, and consequently admitted to probate in England, is a valid execution of a power created by an English will to appoint by will duly executed.[48]

28. But a power of appointment, not in terms, to be by will, is not well executed by a will duly executed, as a will, unless it also observes all the formalities required by the power.[49] Hence, if the power is required to be executed under seal, and that formality be omitted in the will, which in every other respect conforms to the power, it will not be held a valid execution of the power.

29. A power of appointment among the testator's relations and friends is not well executed by a general bequest of the residuary estate of the donee, without reference to the power or to the persons named in it. The court will imply a trust in favor of those for whom such special appointment is intended, limiting the terms "relations and friends" to next of kin; and will require the appointment to be made among the cestuis que trust of the power.[50]

30. It is not important that the appointment under a power should, in terms, refer to the power.[51] But if that be not the case, the court will not apply the instrument to the power, where it can properly have any other operation.[52] But where an appointment is to be made by will, a general residuary clause will be construed as a good execution.[53]

31. A power to appoint among the issue of the appointee of the power will not justify an appointment to some excluding others. And such apppointment not being warranted by the power is the same as no appointment; and the beneficiaries will take concurrently as tenants in common.[54]

[48] D'Huart *v.* Harkness, 11 Jur. N. S. 633.

[49] Taylor *v.* Meads, 11 Jur. N. S. 166.

[50] Caplin in re, 11 Jur. N. S. 383.

[51] Gratwrik in re, 11 Jur. N. S. 919. This construction was adopted because the clause in the will disposing of 3 £ per cent consols could otherwise have no effect, the testator having nó others.

[52] Hurlstone *v.* Ashton, 11 Jur. N. S. 725.

[53] Comber in re, 11 Jur. N. S. 968. See also, Earle *v.* Barker, 11 Ho. Lds. Cas. 280; Mason in re, 11 Jur. N. S. 835.

[54] Stolworthy *v.* Sancroft, 10 Jur. N. S. 762. But this rule is not adopted in Pennsylvania. Hence, in that state, a power to appoint among his heirs, or the heirs of his body, as he may see fit, means absolutely, as the appointee shall elect;

32. A will bequeathing all the estate, real and personal, of the testator, will operate upon lands and personalty embraced in a testamentary power, although the power be not named or referred to.[55]

33. In a recent case,[56] the testator gave a fund to Z. in trust to pay the interest to his widow during her life; and, after that, the whole fund to go to Z. if he survived the widow, but if not, to such persons as he should, by his last will, appoint. The will gave all the residue of the property to Z. Z. died before the widow, leaving a will, which gave his property to his son, but in no other way making any appointment: it was held that the will of Z. was not an execution of the power; that the residuary clause in the first will did not operate upon this trust fund; and that it remained as intestate estate after the death of the widow. It would certainly have been more in accordance with the will of the testator to have held the will of Z. as an appointment of the trust fund.

34. Where the appointee of the power directs the sale of her house and lot by her executors, the power giving her the right to dispose of the same by will, and such appointee having no other house or lot to which the direction in the will could apply, it was held a good execution of the power.[57]

SECTION VII.

THE TESTATOR CANNOT CREATE A POWER BY WILL TO BE THEREAFTER EXECUTED BY HIMSELF; BUT THE WILL MAY MAKE LEGACIES, GIVEN BY CODICIL, A CHARGE UPON REAL ESTATE.

1. Distinction between reference to existing paper, and one thereafter to be made.
2. Any instrument to come into operation after death, is testamentary.
3. One may create a charge upon real estate for payment of future legacies.

and it is no fraud upon the power to exclude some of the number from any participation. Graeff *v.* De Turk, 44 Penn. St. 527.

[55] Van Wert *v.* Benedict, 1 Bradf. Sur. Rep. 114; White *v.* Hicks, 43 Barb. 64. And extraneous proof was here received in aid of the construction, as tending to show such must have been the testator's intent. The text is supported also by Amory *v.* Meredith, 7 Allen, 397.

[56] Johnson *v.* Stanton, 30 Conn. 297.

[57] Keefer *v.* Schevorty, 47 Penn. St. 503.

4. The identification of the legatee may depend upon future events.
5. The avails of real estate can, ordinarily, only pass by will, duly attested.
6. The testator may dispose of personal estate by will unattested, although relatively affecting real estate.
7. He may revoke legacies in a similar manner.
8. But where a sum is given exclusively out of real estate it cannot be so revoked.
9. And where a sum of money is made a charge upon both real and personal estate, and is revoked by an unattested instrument, it has been held still in force, as to the real estate, and apportioned accordingly.
10. But the testator may, by an informal instrument, withdraw his personalty from a joint charge, on real and personal estate.
11. These questions have become practically obsolete under the recent English statutes.
12, 13. Legacies cannot be made dependent upon future memoranda.
14. The distinction is between giving a legacy, before charged on land, and giving the avails of the land.
15. Legacies made a charge on land by implication.
16. Mere circumstances of probability not sufficient.
17. The declarations of the testator not admissible to show charge.
18. General residuary devise of lands may create charge. Effect as to purchaser under devisee.
19. A power once executed, and the execution revoked, may be executed as at first.

§ 22. 1. THERE seems to be no analogy between cases where an existing paper, extrinsic from the will, is referred to by the testator, for the purpose of making clear his present disposition of his estate;[1] and those cases where the testator attempts to * reserve to himself a power of altering, or completing, the disposition of his estate, thereafter, as he may find agreeable to his feelings, with reference to future contingencies. In the former case, the paper is nothing more than an extraneous fact, resorted to for the purpose of identifying the present will of the testator, as expressed in his formally executed testament; neither more nor less than the resort to a deed, to identify an estate, or to monuments, to fix its boundaries. But in the other case, if the future instrument were to be recognized, as part of the will, although informally executed, it would be a direct evasion of the statute.

[1] Habergham *v.* Vincent, 2 Vesey, Jr., 204. Reference may be made in a will to another document for purposes of description, but there can be no valid disposition * except in the will, and a will cannot reserve the power to give by an instrument not executed as a will. Surrogate Bradf. in Thompson *v.* Quimby, 2 Bradf. Sur. Rep. 449; Langdon *v.* Astor's Exrs. 16 N. Y. App. 9. But a direction that advancements, and beneficial provisions for persons and purposes, provided for in the will, "if charged in my book of account, shall be deemed so much on account of the provision in my will or codicils, in favor of such persons or purposes," is valid; and gifts actually made in the testator's lifetime, and so charged, will be deemed advancements. Langdon *v.* Astor's Exrs. supra.

2. Hence, where the testator, by a duly attested will,[1] devised his land to trustees, upon trust to convey to such persons, and for such estates, as he should, by deed or will, attested by two witnesses, appoint, and the testator thereafter executed an instrument, attested by two witnesses, which he called a deed poll, thereby defining a series of limitations in addition to those named in the will: It was decided, after thorough argument and great consideration, that an instrument, in any form, whether a deed poll, or indenture, if the obvious purpose of such deed, or instrument, is not to take effect until after the death of the person making it, shall operate as a will, and that a deed and will cannot unite.

3. But there seems to be no question, that one may by will create a charge upon his real estate, as to both debts and legacies, not then in existence, provided they be, either the one or the other, thereafter legally created. But one cannot, by will, * legalize bequests, thereafter to be made, by an informal instrument. The point is perspicuously explained by Sir *William Grant*, in Rose *v.* Cunynghame.[2] "It is impossible," says the learned judge, "previously to ascertain, what debts a man may * owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him to give. The court has therefore said, that, where he has by a will, duly executed, charged debts and legacies, it is only necessary to show, that there is a debt, or that there is a legacy, in order to constitute a charge. For the moment that character is shown to belong to the demand, you show, that it is already charged upon the estate." But it is here said, that the *charge* must be created in the present tense, and not be left to depend upon the instrument giving the legacy.[2]

*[2] 12 Vesey, 29, 37. And as under the statute of frauds, and by all the English statutes, until that of 1 Vict. ch. 26, an unattested instrument was sufficient to create legacies; if they had before been made a charge upon land, by a will duly attested, the unattested codicil was held sufficient to *create* the legacy thus charged. See also, Whytall *v.* Kay, 2 Mylne & Keen, 765, where the Master of the Rolls says: "It is now settled, though not upon a very satisfactory principle, that a testator may, by will duly executed, charge his real estate with the payment of all legacies, which will include future legacies given by a future unattested codicil, thus placing debts and legacies upon the same footing; but he cannot, by a will duly executed, reserve to himself a power to charge his real estate, or the produce of his real estate, with legacies given by an unattested codicil." See also, Wilkinson *v.* Adam, 1 V. & B. 422; Briggs *v.* Penny, 3 De G. & S. 546; Johnson *v.* Ball, 5 De G. & S. 85; Smith *v.* Attwill, 1 Russ. 266. This last case is distinguished

4. But where the testator devised certain freehold estates to trustees, the yearly income of the same to be paid to the sister of the testator during her life, and after her decease, to dispose of and divide the same unto and amongst the partners of the devisor, who should be in partnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as the trustees should deem advisable, it was held, that this was a good devise to the persons to whom it was ascertained the testatrix had disposed of her business in her lifetime.[3] This was regarded as nothing more than a description of the legatee, instead of naming him, and we suppose the right to do that was never questioned. And whether the legatee were to be ascertained, at the date of the will, or at the death of the testator, or upon the determination of an intervening estate, which should only begin at the decease of the testator, has never been considered material. One may give real or personal estate to his wife, to the children of his brother, and to the next of kin of the testator, after the decease of all his lineal descendants, and in all these cases, and many others, the devise may be so expressed, as to raise serious question, not only in regard to the identity of the persons, which * may be ascer-

from the former by the instrument being signed by the trustees, thus operating as an admission of the trusts. And in the case of Metham *v.* The Duke of Devon, 1 P. Wms. 529, the deed of appointment, which is treated as if made at the same time as the will, does not appear ever to have been proved in the ecclesiastical courts, and, if not, could not properly be said to have any effect, as a testamentary paper.

The general doctrine of the cases which have held, that after a charge of all legacies upon real estate, an unattested codicil is sufficient, under the statute of frauds, to create such legacies, has been seriously questioned, as an infringement of the statute itself. But it is now too well established to require argument, either for its support or overthrow. The following cases, in addition to those already cited, may be referred to upon this point. Hyde *v.* Hyde, 3 Ch. Rep. 83; s. c. 1 Eq. Ab. 409; Masters *v.* Masters, 1 P. Wms. 421; s. c. Eq. Ca. Ab. 192; Lord Inchiquin *v.* French, Amb. 33; Hannis *v.* Packer, id. 556; Brudenell, *v* Boughton, 2 Atk. 268; Buckeridge *v.* Ingram, 2 Vesey, Jr., 652; Swift *v.* Nash, 2 Keen, 20.

But where the testator only charged his real estate with legacies "hereinafter" bequeathed, it has been held, that the charge did not extend to legacies given by a codicil. Bonner *v.* Bonner, 13 Vesey, 379; Strong *v.* Ingram, 6 Simons, 197; Radburn *v.* Jervis, 3 Beavan, 450; Early *v.* Benbow, 2 Coll. 342, 355; Bengough *v.* Edridge, 1 Sim. 173; Rooke *v.* Worrall, 11 Sim. 216.

*[3] Stubbs *v.* Sargon, 2 Keen, 255; s. c. affirmed by the Lord Chancellor, *Cottenham*, 3 My. & Cr. 507.

tained by resort to extraneous evidence; but also, as to the period at which the description of persons, or classes, is to be applied, and this must be removed by legal construction. But we had never supposed any doubt could exist in regard to the complete disposition of the property under such a devise.[4]

* 5. But where real estate is ordered to be sold, and converted into personalty, the avails will not be held a portion of the general personalty of the estate, unless so expressed in the will. The conversion must be out and out, as it is called; that is, for all purposes, and not merely for the purposes of the will; or else the courts of equity will treat the produce of the sale of the real estate the same

[4] 1 Jarman, Eng. ed. 1861, 87. Mr. Jarman, who is the most reliable text-writer, perhaps, in regard to the law of wills, has called in question the soundness of the decision in Stubbs *v.* Sargon. "Now," says this writer, "it certainly was going a great way to say, that the disposition in the case was *complete*. It is conceived, that no devise can be complete till every act, depending *solely upon the volition of the devisor*, has been done, to point out *of what*, and *to whom*, the devise is." And the learned writer proceeds to illustrate the distinction between an indefiniteness of description in the will, which depends upon the will of the testator for its determination, and that which depends upon other agencies, and insists, that if in the latter case the disposition is to be held complete, there is no reason why the act of the testator, which is to determine this event, may not as well be the signing of a paper by the testator, designating the person, or naming to a third party the person, who shall be the devisee. And the editors of this valuable work, in the latest English edition, claim, that the principle contended for by Lord *Cottenham*, Chancellor, in the case of Stubbs *v.* Sargon, will justify the admission of a memorandum found in the testator's possession, at his decease, explaining the import of ciphers used in the will, and which, without such explanation, would be wholly unintelligible, as was denied in Clayton *v.* Lord Nugent, 13 M. & W. 200. But, with all proper deference to so high an authority, we must say, we think the cases are not parallel, and there seems to us no incongruity in the decision of Stubbs *v.* Sargon, and no want of *completeness* in the disposition of the will in that case. And we confess our inability to comprehend, why the persons who should be one's partners in business, or to whomsoever he should dispose of his business, can fairly be said to be *exclusively* determinable by his own will. That his own will must have considerable influence in the determination of the question, is true; but not more so, than in the selection of a wife, and in neither case can the determination be said to be exclusively dependent on the will of one of the parties to the new relation. And it was never questioned, that one may make a bequest to his wife, he having none at the time, and if he should leave a wife, a widow, surviving him, there has never been any question that she would be clearly entitled to the bequest, although not sustaining that relation at the date of the will, and her coming into that relation depending, in one sense, exclusively upon the future will and volition of the testator, since no one could become his wife against his consent.

as if there had been no sale,[5] and it will not pass by an unattested codicil.[5]

6. And although all charges upon real estate, for the payment of debts or legacies, must of necessity, in the absence of directions to the contrary, be construed, as merely in aid of the personalty, and only intended to supply any deficiency in that fund; nevertheless, even in cases where the charge of the real estate is specifically in aid of the personalty, under the old law, it was competent for the testator, by an unattested codicil, to make a specific disposition of any portion of the personal estate.[6]

7. And where the real estate is charged for the payment of legacies, expressly given in the same instrument creating the charge, it is, nevertheless, competent for the testator to revoke any of these legacies by an unattested codicil,[7] since such a charge is merely in aid of the personalty.

8. But where the sum is given, originally, exclusively out of land, or as a charge solely upon land, the same can neither be revoked or modified by an unattested will or codicil, but it must be done by some instrument executed with all the formalities necessary to create the charge, in the first instance.[8]

*9. And where the testator, by his will, gave an annuity, payable out of his freehold, copyhold, and personal estate, and by a codicil, not duly attested, revoked the annuity, it was held an effectual revocation only as to the personalty, and that it still remained a charge upon the freeholds.[9] But in other cases, where a sum of

[5] Sheddon *v.* Goodrich, 8 Vesey, 481; Hooper *v.* Goodwin, 18 Vesey, 156; Gallin *v.* Noble, 3 Mer. 691.

[6] Coxe *v.* Bassett, 3 Vesey, 155.

[7] Attorney-General *v.* Ward, 3 Vesey, 327.

[8] Lord *Hardwicke*, in Brudenell *v.* Boughton, 2 Atk. 268, 272; Beckett *v.* Harden, 4 M. & S. 1; Locke *v.* James, 11 M. & W. 901. In the last case, the testator, after creating a charge upon his real estate of six hundred pounds, by his will duly attested, subsequently run a pen through the word "six," and wrote the word "two" above it, leaving the word "six" still legible, and on the same day, added a memorandum or codicil to his will, signed in the presence of one witness only, recognizing the alteration, and it was held the alteration of the will must be regarded, as not duly made, and that the instrument remained in full force, as originally drawn.

[9] Mortimer *v.* West, 2 Simons, 274. This case is regarded as standing somewhat alone, inasmuch, as being a charge upon both real and personal estate, it might, on general principles, be regarded as subject to informal revocation, in part, at least. See Fitzgerald *v.* Field, 1 Russ. 428.

money, or an annuity, is made a charge upon a general fund, consisting, partly of real and partly of personal estate, and the bequest has been attempted to be revoked by an instrument not duly attested under the statute of frauds, it has been held, that the revocation being inoperative, so far as the real estate was concerned, the claimant was entitled to that proportion of the sum given, which the real estate bore to the personal.[10]

10. There seems to be no question, however, that the testator, after having charged both real and personal estate with the payment of legacies, may, by a subsequent unattested instrument, so far withdraw the personal estate from the operation of such bequest, as to leave it a sole charge upon the real estate. And this effect will be produced by a new disposition of all the testator's estate, real and personal, by means of an unattested codicil, it being operative only upon the personalty, and leaving the former legacies a charge upon the real estate.[11]

* 11. But it must be confessed, these distinctions are somewhat refined and shadowy; and as they have now become, in England, and in most of the American states, substantially obsolete, by the statute requiring the same formality, in the disposition of personal as of real estate, we shall not attempt to pursue them further at this time.

12. It may be proper to suggest, that a practice prevails, to some extent, of executing wills in a formal manner, but referring the amount of the legacies, and sometimes the names of the legatees, to such a memorandum as the testator shall leave in some secret or private escritoire, or drawer, or cabinet, or pocket-book, or some other place, kept under the exclusive inspection and control of the testator. And in practice, such wills have commonly been carried into effect, without much scrutiny. But such a bequest, where the statutes require formalities in the execution of wills of personalty, cannot be regarded as valid. Thus, in a recent case in Massachusetts,[12] it was held, that a will, duly attested, giving a certain sum of money to a person, in trust, to appropriate the same in such manner as the testator may, by any instrument in writing, under his hand, direct and appoint, and an appointment by a separate paper,

[10] Stocker *v.* Harbin, 3 Beavan, 479.

[11] Buckeridge *v.* Ingram, 2 Ves. Jr. 652; Sheddon *v.* Goodrich, 8 Vesey, 481, 500.

[12] Thayer *v.* Wellington, 9 Allen, 283.

signed by the testator, but not attested in conformity to the statute of wills, declaring the appropriation and naming the beneficiary, do not create a valid bequest in favor of such beneficiary; and the fact that the legacy is appropriated, by the unattested instrument, to a public charity, does not give it any greater legal effect, no charity being declared or indicated in the will.

13. The most indulgence in that direction which the rules of law will allow is, that such legacies should be defined, or determined, by the reference to, and virtual incorporation of, an existing paper, into the will, making such paper, in construction of law, a portion of the instrument, although not attached, and its contents not known to any one but the testator. The paper should be known to witnesses, so that its identity, as well as existence, may be susceptible of proof.[13]

14 In those states, where there is still a distinction between the formalities required in the execution of wills affecting real and personal estate, the point may be important to be borne in mind, that while a legacy, charged on land by the will, in general terms, may be given by a subsequent unattested codicil, the avails of the sale of land, as before stated, can only be disposed of by such an instrument as will be a sufficient devise of the land itself, the courts regarding the avails of land precisely the * same as the land itself.[14] It is held in America, that to give a legacy and make it a charge upon land, the will must be executed with the same formalities as are required in regard to real estate.[15]

15. Sometimes legacies are held to become a charge upon the real estate by force of the residuary clause, by way of implication, as when the testator, after making certain bequests, and directing the payment of his debts, devises "all the rest and residue" of his estate, real and personal, "not hereinbefore disposed of," after the payment of debts; and it was held under the circumstances, the personalty not being sufficient to pay the general legacies, to make them a charge upon the real estate.[16]

[13] Ante, § 21, pl. 14, et seq.

[14] Hooper *v.* Goodwin, 18 Vesey, 156, 164. See also, Attorney-General *v.* Ward, 3 Vesey, 327; Brudenell *v.* Boughton, 2 Atk. 268.

[15] Ex parte Winslow, 14 Mass. 421.

[16] Rafferty *v.* Clark, 1 Bradf. Sur. Rep. 473; Cox *v.* Corkendall, 2 Beasley, 138. So where the lands are devised to the executors, who are directed to pay the legacies, it creates a charge on the land. Ib. See also, Massaker *v.* Massaker, 2 Beasley, 264.

16. But the fact that the legacies cannot be paid otherwise than by sale of the real estate; and that the testator will also be intestate as to the bulk of his estate; and that, by charging the legacies upon real estate, just about the whole property will be disposed of, — although creating a strong impression that such was the expectation of the testator, yet, standing alone, it is not sufficient to establish the charge upon the real estate as against the heir.[17] And in this case, it was said it is well settled in this court, that parol evidence is inadmissible as to the amount and nature of the testator's estate, or other extrinsic circumstances, in order to ascertain the testator's intention to charge legacies upon real estate, or to exonerate the personalty.

17. The declarations of the testator are not admissible to show an intention to charge legacies upon land.[18]

18. But where the testator, after giving legacies, makes no specific devise of his real estate, but blends it all with the personalty, in the residuary clause, giving it all to the residuary devisee, whom he makes sole executor, he thereby charges the realty with the payment of the legacies.[19] But this rule will not extend to specific legacies charged upon a particular fund. Such legacies must be paid out of the particular fund upon which they are charged; and, if that fund fails, they fall with it.[20] And a legacy cannot be held a charge upon lands so as to bind them in the hands of a purchaser under the devisee, unless it appear, by direct expression or plain implication, that it was the intention of the testator to charge the land.

19. If a power is to be exercised, either by deed or will, and have been once exercised by deed, with power of revocation reserved therein, and the same have been revoked, it may then be exercised either by deed or will, the same as at first.[21]

[17] Leigh *v.* Savidge, 1 McCarter, 124.

[18] Massaker *v.* Massaker, 2 Beasley, 264.

[19] Gallagher's Appeal, 48 Penn. St. 121; Mellon's Appeal, 46 Penn. St. 165; Moore *v.* Beckwith, 14 Ohio N. S. 129.

[20] Mellon's Appeal, 46 Penn. St. 165.

[21] Saunders *v.* Evans, 8 Ho. Lds. Cas. 721.

SECTION VIII.

REQUIREMENTS IN THE EXECUTION OF WILLS, UNDER THE STATUTE OF 1 VICT. CH. 26.

1. The provisions of the statute 1 Vict.
2. The limited construction of the terms, "at the foot, or end thereof."
3 & n. 2. Construction of the amendatory act of 15 & 16 Vict.
4. Sufficient, if testator's signature followed a notarial certificate at the end of the will.
5. Testator's signature must be made, or acknowledged, before the witnesses.
6. Existing requirements of the English law, as to the execution of wills.
7. That now dispenses with any formal attestation.
8. So also with the credibility of the witnesses.
9. Enumeration of the particulars in which the early and late English statutes differ.
10. An attestation clause still desirable in practice.
n. 19. No publication required by present English statute.

§ 23. 1. THE statute now in force in England, requires that a will, both of personal and real estate, "Shall be signed at the foot, or end thereof by the testator, or by some other person, in his presence and by his direction; and such signature shall be made, or acknowledged, by the testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall attest, and shall subscribe the will, in the presence of the testator, but no form of attestation shall be necessary."

2. The ecclesiastical courts adopted such a construction of *the words, "at the foot, or end thereof," by requiring that the signature of the testator should immediately follow the written words of the will, so that no space should remain, whereon any thing more could be written, that it became necessary to pass an additional statute, defining the import of these terms more carefully.[1]

*[1] 15 & 16 Vict. ch. 24. The enacting clause of this statute is, That the signature by the testator shall be valid, "if so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent, on the face of the will, that the testator intended to give effect, by such his signature, to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot, or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance, that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, either with or without a blank space

3. Under the latter act, many questions have already arisen, in regard to the position of the testator's signature.[2] In the * case of

intervening, or shall follow, or be after, or under, or beside the names or one of the names of the subscribing witnesses; or by the circumstance that the signature shall be on a side or page, or other portion of the paper, or papers, containing the will, whereon no clause, or paragraph, or disposing part of the will shall be written above the signature; or by the circumstance, that there shall appear to be sufficient space, at the bottom of the preceding side, or page, or other portion of the same paper, on which the will is written, to contain the signature." "But no signature," &c., "shall be operative to give effect to any disposition, or direction, which is underneath, or which follows it, nor shall it give effect to any disposition, or direction, inserted after the signature shall be made."

[2] Re Gullan, 4 Jur. N. S. 196; Trott *v.* Trott, 6 Jur. N. S. 760. In New York, where the statute requires that the testator should subscribe the will, and each witness sign his name "at the end," it was considered that this provision required that they should all agree as to what is the end of the will, and where the signature of the testator in one place was followed by the appointment of executors, to which the names of the witnesses were signed, and then followed a direction to the executors, signed only by the testator, the testator and the witnesses in no instance coinciding, as to where the end of the will was, it was held that the will was not validly executed. M'Guire *v.* Kerr, 2 Bradf. 244.

This seems to argue a very impracticable degree of refinement, but it is abun- * dantly supported by the decisions of the English ecclesiastical courts, as to what is to be regarded as the end of the instrument. Goods of Milward, 1 Curt. 912, and other cases cited. And the argument of the learned surrogate, as a mere matter of dialectics, seems to be pretty conclusive, that if the statute requires both the witnesses and the testator to sign "at the end of the will," and they do not sign at the same place, they cannot both be "at the end." 2 Bradf. 244.

Perhaps the various refinements of the courts, as to what is really signing at the end of the will, springs, in some degree, from the dread of falling into the same error which the courts did under the statute of frauds, and which this statute was intended to remedy. For there is no doubt the statute of frauds, by requiring the will to be signed by the testator, in the presence of three or four witnesses, who were also required to subscribe their names, or to attest the subscription by the testator, was intended to require that both the testator and the witnesses should sign at the end of the instrument. And it was, in fact, as much a perversion of the statute, when the courts determined that the testator's name in the beginning of the will might be regarded as the testator's signature, as if they had held that the signature might be dispensed with. It was, in effect, the same thing. And we need not feel surprised that the courts are, at first, somewhat rigid in requiring the testator to sign at the very end of the will. But time will probably soften the asperity of these refinements, and we shall soon find the courts, in this country, adopting less rigid rules, or the legislature will have to interfere as it did in England. 2 Bradf. 244.

It is held sufficient, under the present English statutes, if the testator subscribe his name at the end of the will, in the attestation clause, thus: "Signed by me,

Trott *v.* Trott, the testator, at the close of his will directed, that each of the legatees, including his father, mother, *brothers, and John Walker, in the presence," &c. Walker in re, 8 Jur. N. S. 314; Torre in re, 8 Jur. N. S. 494.

So also, where the names of the testator and the subscribing witnesses were written upon a paper, which had been before pasted at the foot or end of the will. Gausden in re, 8 Jur. N. S. 180. But where there was left a space, at the bottom of the will, and then a separate piece of paper was attached by wafers, upon which the attestation clause, the names of the testator, and of the attesting witnesses were afterwards written, the court, on motion, refused probate. Lambert in re, 8 Jur. N. S. 158. But the paper, being propounded, was afterwards admitted. The final conclusion of the learned judge seems to have been, that a paper attached to the main paper on which the will was written, will be regarded the same as if it had all been one paper, provided there is satisfactory proof, or reasonable ground to presume, that the paper was attached before the execution, and that the paper was in the same state at the time of execution as at the time it is offered for probate.

And when the case of Lambert was brought before the Court of Probate again by the executors, and argued by counsel, the learned judge reconsidered his former decision, and held the will entitled to probate. "For it is apparent," said the learned judge, "on the face of the will, that the testator intended to give effect, by such signature, to the writing signed as his will." Cook *v.* Lambert, 9 Jur. N. S. 258 (1863). But where a codicil was written upon the first side of a sheet of foolscap, and then a memorandum, "for my signature and witnesses see next side," which was blank, and also the third side and the fourth side, except the signature of the testator and those of the witnesses, it was held no sufficient execution, the witnesses at the time of attestation seeing no writing. Hammond in re, 9 Jur. N. S. 581.

So, also, where the will covered four sides of letter paper, leaving no room for the execution of the same, and the attestation clause, with the signature of the testator and the witnesses, were written upon a separate half sheet of paper, and this was attached by three wafers to the bottom of the second page of the will, and there was no evidence whether the papers were in the same state at the time of the attestation, it was denied probate. West in re, 9 Jur. N. S. 1158. If the signature be written partly across the two last lines of the will, it is sufficiently at the foot or end of the will. Woodley in re, 33 Law J. Prob. 154, S. C. 3 Sw. & Tr. 429. And where the will filled two sides of a sheet of paper, leaving no room on the second page for the signatures of the testator and attesting witnesses, which were written along the side of the will on the third page, it was held to be a due execution. Wright in re, 13 Law Times N. S. 195. So also, where the attestation was opposite the end of the will, although upon the third side of the sheet, the will ending on the second side. Williams in re, 11 Jur. N. S. 982. In this case, there was a blank of the lower half of the first and second pages and the upper fourth of the third side. So also, it will be sufficient if the testator write his name crossways upon the side of the paper near the foot of the sheet where the lines are shorter, and the names of the witnesses are crowded in at the bottom of the page. Jones in re, 11 Jur. N. S. 118. Part of a will was written

sisters, should, upon being paid his legacy, give a receipt "from all further claim upon the estate of their departed brother, Joseph Skidmore;" which was the only signature. Then followed the names of the witnesses, both of whom were deceased at the time of the probate, and one of the names of the witnesses was written in paler ink than the other. It was claimed, that the will was not signed at all, and that it could not fairly be presumed that the witnesses subscribed the will at the same time; but the court overruled both objections. Sir *Cresswell Cresswell*, said: "I see no reason to doubt that the deceased intended that his name, so written, should be his signature to the whole will." And in regard to the color of the ink being different in the two signatures of the witnesses, the learned judge said: "I think that is too slight a circumstance upon which to found any presumption, and, in the absence of evidence to the contrary, I must conclude omnia rite esse acta." [3]

* 4. Under this act, the signature being at the end of a notarial certificate immediately following the will, and detailing the circumstances under which it was made, was held sufficient, under the latest English statute.[4]

upon the first two sides of a sheet of paper, the final clause being at the top of the third side. At the bottom of the second side was the signature of the testator, an attestation clause, and the signature of two witnesses; the last two letters of the testator's name extending upon the third side and beneath the final clause. It was held a good execution of the whole writing. Powell in re, 13 Law T. N. S. 195. But where the testator, intending to execute his will, signed his name at the foot of the first five sheets, but inadvertently omitted to do so at the end of the will on the sixth sheet, the witnesses duly attesting having signed the first five sheets, and also the sixth below a full attestation clause, although one sentence of the fifth sheet ended upon the sixth sheet, and no bequest was actually written upon the sixth sheet, it was held that the execution was invalid even as to the first five sheets. Sweetland *v.* Sweetland, 11 Jur. N. S. 182. But where the signature of the testator, from the obvious sequence of the sense of the context, really follows the dispositive part of the will, though it may occupy a place in the paper literally above that portion, it will be held entitled to probate. Kimpton in re, 3 Sw. & Tr. 427.

[3] The costs of the defendant were here allowed to come out of the estate, upon the ground that the defence had been made in good faith. The mere fact that the names of the two witnesses are not written in the same ink proves nothing. For at the same time they might have subscribed at different tables and out of different inkstands. And with the same ink, the quantity shed from different pens, by different hands, gives different shades of color.

[4] Page *v.* Donovan, 3 Jur. N. S. 220.

5. By the late English statutes it is required, that the "signature" of the testator shall be made or acknowledged in the presence of the witnesses. Under this provision it has been held, that the acknowledgment of the paper as the testator's will, is not sufficient,[5] but that the thing to be acknowledged by the testator is his "signature," whether made by himself, or by another for him.[6] Hence there is no sufficient execution, unless the witnesses either saw, or might have seen the testator sign, or there is something which amounts to an express acknowledgment of the signature as his.[7] Where the witnesses saw, or might have seen the testator affix his name to the paper, nothing further is required than that the testator should state the paper to be his will, or direct the witnesses to put their names under his, or that he, or some one in his presence, should request the witnesses to sign.[8] And even where the witnesses did not see the testator sign his name, or were not in a situation where they might have seen him sign, it seems to be the more satisfactory opinion, that it is not necessary that the testator should state to * the witnesses that it is his signature. The production of the will by the testator, it having his name apparent upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the statute.[9] And an intimation to this effect by the testator, by gestures, will have the same force as a declaration.[10] And it seems not indispensable that the witnesses should be told that the instrument is a will.[11] And even where they were deceived into the belief that it was a deed, and not a will, which they were called to witness, it will not have the effect to invalidate the execution.[12]

[5] Moore *v.* King, 3 Curt. 243; 7 Jur. 205; Hudson *v.* Parker, 1 Rob. 14; Shaw *v.* Neville, 1 Jur. N. S. 408.

[6] Re Regan, 1 Curt. 908. Where the testator requested the witnesses to sign their names to the paper, having before signed it himself, but the witnesses were not present, and saw no writing upon the paper when they affixed their names, the execution was held insufficient. Pearsons in re, 10 Jur. N. S. 372.

[7] 1 Jarman, Eng. ed. 1861, 102, and cases cited; Ilott *v.* Genge, 4 Moore, P. C. C. 265.

[8] 1 Jarman, Eng. ed. 1861, 102, and cases cited; Re Davis, 3 Curt. 748; Re Ashmore, id. 756; 7 Jur. 1045; Gaze *v.* Gaze, 3 Curt. 451; 7 Jur. 803.

[9] 9 Wms. Exrs. 77; Sir *Herbert Jenner Fust*, 3 Curt. 172, 175; Leech *v.* Bates, 6 Notes Cas. 704.

[10] Re Davies, 2 Rob. 337.

[11] Keigwin *v.* Keigwin, 3 Curt. 607; 7 Jur. 840.

[12] 1 Jarman, 102, and cases before cited, upon same point under statute of

6. The result of the decisions under the existing English statutes seems to be, that the testator must sign, or acknowledge his signature before either of the witnesses subscribe, and that a subsequent acknowledgment will be of no avail.[13] The signature of the testator must also be made or acknowledged in the presence of the witnesses at the same time.[14] And the witnesses must subscribe their names in the presence of the * testator, but it is not indispensable this should be done in the presence of each other.[15]

7. The late English statute dispenses with any form of attestation. And the rule of law, as to signing by the hand of another, or by mark, seems to be the same under that statute as under the statute of frauds.[16]

8. The present English statute expressly dispenses with the credibility or competency of the witnesses to a will. Hence an interested or an infamous witness is sufficient, and it has been considered that even an imbecile, or an insane witness, might also be sufficient.[17] But it has been questioned whether the provision could fairly be construed to extend to a witness wanting in the requisite capacity to understand the transaction, but no case has so held.[18]

9. According to the recent edition of Jarman's work on wills, "the cases respecting the local position of the testator's signature, and as to the admissibility of an acknowledgment, as a substitute for signing before the witnesses, the necessity of publication, and the qualifications of attesting witnesses, are obviously no longer applicable" under the present statutes.[19]

frauds. Sugden's Essay on Wills, 334; Faulds *v.* Jackson, 6 Notes Cas. Supp. 1.

[13] Re Summers, 7 Notes Cas. 562; 14 Jur. 791; 2 Rob. 295; Re Olding, 2 Curt. 865; Re Byrd, 3 Curt. 117; Cooper *v.* Bockett, id. 648; Charlton *v.* Hindmarch, 5 Jur. N. S. 581.

[14] Re Allen, 2 Curt. 331; Re Simmonds, 3 id. 79; Moore *v.* King, id. 243; 7 Jur. 205. This last point was long considered doubtful. Sugd. on Wills, 15, Essay, 336; but was finally decided in favor of the will. But in a case occurring shortly after, Lord *Brougham*, Casement *v.* Fulton, 5 Moore, P. C. C. 140, said, if the statute required the witnesses to sign in the presence of each other, the committee were bound by it, and that there could be no reasonable doubt raised, that the words of the act amounted to this requisition.

[*15] Faulds *v.* Jackson, 6 Notes Cas. Supp. 1; Sugden's Essay, 737; Re Webb, 1 Jur. N. S. 1096.

[16] 1 Jarman, 104.

[17] Sugden's Essay, 334, 335.

[18] 1 Jarman, 104, 105.

[19] 1 Jarman, 106, 107. We have already mentioned that the present English

* 10. But it is the advice of all men experienced in the law appertaining to this complicated and difficult subject, and especially those who have had experience in the preparation of last wills, that care should be exercised, not only to have all legal formalities strictly complied with, but that these should be carefully enumerated in the attestation clause to be subscribed by the witnesses, which will not only tend to aid the recollection of the witnesses, but the better enable the court to give the true construction to the transaction.

SECTION IX.

CODICILS — THEIR ORIGIN, NATURE, HISTORY, AND CONSTRUCTION.

1. Codicils in our law, at the present day, are an alteration of one's will.
2. In the Roman Civil Law codicils were informal testaments.
3. There were two kinds of codicils by that law, the latter very similar to ours.
4. All the codicils are to be regarded as parts of the will, and the whole will construed together.
5. Codicils have the effect to bring the testamentary acts all to their own date.
6. Codicils, duly executed, may republish and set up papers not formally executed.
7. It will be convenient to here omit other rules affecting codicils.
8. The origin of codicils while Lucius Lentulus was proconsul of Africa.
9. By the law of Louisiana codicils are not recognized as distinct from wills.
10. Codicil may operate as a republication of the will, if inoperative in other respects.

statute dispenses with publication, and hence the decisions on that point under the former act are of no force under this. In regard to this point, Lord *St. Leonards* says, Essay, 309: "The getting rid of publication is a great improvement." But why, it may be asked, if it meant nothing under the former act? Ante, § 18, pl. 12 and 13, and notes. This avowal, by so competent a judge of the matter, confirms our former impression, that the statute of frauds really did require publication; but nothing more than a declaration that the paper produced by the testator is his will, and that he desires the witnesses to attest it as such, is fairly implied in that requirement. And it is certainly not important, that this should be done with any particular formality. All that is really implied by publication, as before stated, is that the witnesses should have some satisfactory assurance from the testator, either by word or act, or silence, when others are acting on his behalf in his presence, that he desires the witnesses to understand that he is executing, and that they are attesting, his last will and testament. This is all that the term ever could imply. But as shown by us, in § 18, the English decisions certainly did not require even this under the statute of frauds. And when the courts had practically dispensed with publication, the legislature unquestionably did well to dispense with it altogether. Ante, § 18, pl. 12 et seq. and notes.

11. Codicil, prima facie revoked, by destruction of will.
* 12. Erroneous recital of the will in the codicil, has no effect upon its construction.
13. Disposition of all the estate by codicil may not include specific bequests in will.
14. Codicil may be treated as the will.
15. Papers in the form of deeds held testamentary. Two wills admitted to probate together.

§ 23 *a*. It seems scarcely necessary to give any more formal exposition of the matter of codicils than what will naturally occur in treating upon the several subjects where they become operative. For the convenience of the student, however, we have judged it proper to bring together here some few points affecting that subject, which either will not occur in other portions of the work; or, if so, not in a form so much fitted for his instruction.

1. A codicil, in the sense in which it is now universally used, in the English and American law, may be defined to be some addition to, or qualification of, one's last will and testament. The term codicil, as stated in our definition of it, is derived from codicillus, a diminutive of codex, and literally imports a little code, or writing; a little will, or testament. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property, in prospect of death, without the institution of an heir or executor.[1] And the early English writers define the term much in the same way.[2] But the present definition of the term is that first given.[3]

2. By the Roman Civil Law, and a similar rule obtained in the canon law, and in the early English law, it was considered, that no one could make a valid will, or testament, unless he did make an executor, as that was of the essence of the act. This was attended with great solemnity and formality, in the * presence of seven Roman citizens, as witnesses. Hence, as before stated, a codicil is there termed an "unsolemn testament."[4]

*[1] 2 Domat, by Strahan, 485, pt. 2, book 4, sec. 1, art. 1; Inst. § 2, l. 2, tit. de codicillo.

[2] Swinburne, pt. 1, sec. 5, pl. 2. This writer declares that a codicil differs only from a testament in that it is made "without the appointment of an executor."

[3] Wms. Exrs. 8. "A codicil is an addition or supplement to a will, and must be executed with the same solemnity." 4 Kent, Comm. 531; Brant *v.* Willson, 8 Cowen, 56; Costor *v.* Costor, 3 Sandf. Ch. 111.

*[4] Swinb. pt. 1, sec. 5, pl. 4; Godolph. pt. 1, ch. 1, § 2; id. pt. 1, ch. 6, § 2; Woodward *v.* Lord Darcy, Plowd. 185, where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law in England, for some centuries, probably.

3. By the Roman Civil Law, there were two kinds of codicils; one where no testament existed, and which embraced the disposition of property only, without creating any such trusts and confidences as it is common to institute in formal testaments; and which, in fact, more nearly resembled what we now call a donatio mortis causa, or nuncupative will, than any thing else in force among us, except that they were in writing. The other form of codicil, by the Civil Law, was where a prior testament did exist, the codicil having relation to the testament, and forming part of it, and to be construed in connection with it, much in the same way codicils are at the present day.[5]

4. It is a clear principle of the English and American law, that all codicils, however numerous, are to be regarded as parts of the will, and all, together with the will, are to be construed as one instrument.[6] We shall have occasion to speak more specifically upon this point in other portions of the work.

5. It has often been held, that a codicil may operate as a republication of a former will; which, in effect, it always does, if it clearly recognizes the existence of such an instrument.[7] The effect of a codicil ratifying, confirming, and republishing a will, is to give the same force to the will as if it had been written, executed, and published at the date of the codicil.[8]

[5] 2 Strahan's Domat, 487, pt. 2, book 4, tit. 1, sec. 1, art. 5; Inst. l. 16, D. de jure codic.

[6] Crosbie *v.* Macdoual, 4 Vesey, 610. The codicil should be so construed, if it can fairly be done, as to make it harmonize with the purposes declared in the body of the will. Proctor *v.* Duncan, 1 Duvall, 318; Delafield *v.* Parish, 25 N. Y. Rep. 9.

[7] Coale *v.* Smith, 4 Penn. St. 376.

[8] Brimmer *v.* Sohier, 1 Cush. 118. And it is not requisite that the codicil should be upon the same piece of paper as the will, in order that it may operate as a republication; it is sufficient, that it intelligibly identify the will, by reference. Van Cortland *v.* Kip, 1 Hill, 590; s. c. 7 Hill, 346; Van Kleeck *v.* The Dutch Church, 20 Wend. 457; Snowhill *v.* Snowhill, 3 Zab. 447. But where the codicil professes the purpose of the testator to alter the will in one particular, this carries an implication, that it was not intended to alter it in any other particular, and consequently, any general expression, which might appear like an intention to alter it in some other particular, is not to receive that construction. Quincy *v.* Rogers, 9 Cush. 291. A codicil attached to or referring to a particular will ipso facto has the effect to republish that particular will, and also to revoke all intervening wills between the date of that particular will and the codicil, unless the language of the codicil indicates a different purpose. Neffs. Appeal, 48 Penn. St. 501; post, § 29, pl. 4 and notes.

* 6. Where there are numerous codicils, the effect of the later ones is to republish the earlier ones.[9] But where a codicil is relied upon as setting up a former will, or codicil, informally executed, so as to make it a subsisting portion of the will, it is requisite that the codicil, thus relied upon, be executed with due solemnity, for all purposes embraced in the paper thus set up.[10] And it is also indispensable, in such case, that the informal paper thus set up be clearly identified by the codicil relied upon for that purpose.[11] But it is not competent for the will, when executed in due form, to provide for the payment of such legacies, as may thereafter be given by codicils informally executed, since all such papers are testamentary, and must be so treated, thus referring their operation to the effect of the probate.[12]

7. The remaining rules of law, applicable to the subject of codicils, must be referred to the several heads wherein the corresponding subjects are treated, which will thus afford a more convenient opportunity of presenting them in their proper relations.

8. The following statements in regard to the origin of codicils in the Roman law, and the present law of Louisiana upon that subject, are from Bouvier's Law Dictionary, and are believed to be authentic. "Codicils owe their origin to the * following circumstances. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of fidei commissum, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar fidei commissa, and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority.[13]

9. "The *form* of devising by codicil is abolished in Louisiana;[14] and whether the disposition of the property be made by testament, under this title, or under that of institution of heir, of legacy, co-

[9] Guest *v.* Willasey, 3 Bing. 614; s. c. 12 J. B. Moore, 2.

[10] Buel *v.* Cunningham, 3 B. Mon. 390.

[11] Tonnele *v.* Hall, 4 Comst. 140; ante, § 21, pl. 14 et seq.

[12] 2 Ves. Jr. 204; 12 Vesey, 29; 2 My. & K. 765; 1 Ves. & B. 422; ante, § 22.

[13] Inst. 2, 25; Bouvier, L. Dict. tit. Codicil.

[14] Code, 1563.

dicil, donatio mortis causa, or under any other name indicating the last will, provided it be clothed with the forms required for the validity of a testament, it is, as far as form is concerned, to be considered a testament." [15]

10. A codicil expressed to take effect only upon an event which does not happen, is entitled to probate, if it refer to the will by date, on the ground, that it amounts to a republication of the will.[16]

11. The codicil is prima facie dependent upon the will; and where the will and codicil to it are shown to have been in existence, and the will has been destroyed, the burden of proof is upon the party setting up the codicil, to show, that it was the testator's intention to have it operate separately from the will, the presumption being, otherwise, that the destruction of the will was intended as a revocation of both.[17]

* 12. An erroneous recital in a codicil, that a gift had been made in the will in a particular form, does not extend such bequest beyond its legitimate operation according to the terms of the will.[18]

13. A disposition by codicil of "all my real and personal estate and effects," was held, on the context, not to include a fund of personal estate specifically disposed of by will.[19]

14. And where a person duly executed a paper commencing, "This is a codicil to any will and testament of me, A. B.," and no will could be found, nor any evidence that any will had ever been executed by him, it was held that such paper must be admitted to probate as the will of such person.[20]

15. And two papers, executed by a married woman, having a power of appointment, the first professing to dispose of all her property by deed or gift, and the second expressing a wish that the donee should pay certain bequests out of it, and which papers were afterward spoken of by her as her will, were admitted to probate as such.[21] And where the testator had erased one clause in his will,

[15] Ib. Vide Brown, Civil Law, 292; Domat, Lois. Civ. liv. 4, t. 1, § 1; Leçons Elément. du Dr. Civ. Rom. tit. 25.

[16] Mendes da Silva in re, 2 Swab. & Trist. 315.

[17] Grimwood *v.* Cozens, 2 Swab. & Trist. 364; Dutton in re, 3 Swab. & Trist. 66.

[18] Smith in re, 2 Johns. & H. 594.

[19] Arrowsmith in re, 2 De Gex, F. & J. 474.

[20] Coulthard in re, 11 Jur. N. S. 184.

[21] Webb in re, 3 Sw. & Tr. 482. See also, Nickalls in re, 34 L. J. Prob. 103; S. C. 13 W. R. 1047.

and directed it to be copied with the omission of that clause; and in making the copy other important omissions were made by mistake, and the imperfect copy was duly executed, and both remained in the testator's possession until his death, when the mistake was discovered, — the court, being satisfied by parol proof of the foregoing facts, and that the testator had executed the second instrument under the belief that it was an exact copy of the former with the erasure made by him, held that the latter did not revoke the former, and admitted both to probate as forming together the will of the testator.[22]

[22] Birks *v.* Birks, 13 Law Times, N. S. 193. In interpreting a will and codicil, the general rule is that the whole will takes effect so far as it is not inconsistent with the codicil. And, if a devise in the will is clear, it is incumbent upon the party who claims its revocation by the codicil to show an intention to revoke, equally clear with the original intention to devise. Robertson *v.* Powell, 2 H. & C. 762. See also, Lease *v.* Knight, 11 Law T. N. S. 134.

It is said, in the late case of Burhans *v.* Haswell, 43 Barb. 424, that, if a codicil be imperfectly executed, it is of no force as part of the will; and that it acquires no additional validity by being admitted to probate, and recorded by the surrogate as part of the will; he having no authority to act upon such a case. If the proceeding were in solemn form, with due notice to all parties to appear, and contest the probate, it may be questionable how far parties can go behind the decree of the court as to what constitutes the will of a deceased person.

*CHAPTER VII.

REVOCATION OF WILLS.

SECTION I.

BY MARRIAGE AND THE BIRTH OF ISSUE, OR OTHER CHANGE OF CONDITION.

1. Marriage of feme sole clearly a revocation in law.
2. Marriage of a man, and issue born, will have the same effect.
3. Not decided whether the issue must be born of the subsequent marriage.
4. The birth of a posthumous child will have that effect. Death of such issue not material.
5. Will not have that effect, if such issue otherwise provided for by testator.
6. Only has this effect, where will disposes of all testator's estate.

n. 11. Different forms of provision for issue may have bearing on construction of will.

7. The inheritance of an estate by such issue, will not prevent the implied revocation.
8. It was long doubted if this presumptive revocation can be rebutted by parol.
9. Finally settled, such evidence not competent unless it amount to republication.
10. Such revocation not prevented by a provision in the will for the future wife.

n. 13. Will not to take effect, unless the issue might inherit the estate.

11. By the present English statute, marriage operates to revoke will.
12. The doctrine of the American courts, as stated by Chancellor Kent, is the same as under the former statute in England.
13. The same rule declared by Chief Justice Shaw in Massachusetts.

n. 18. The effect of omitting one or more of testator's children in his will.

14. Presumptive revocation of will does not arise from general change of circumstances.
15. Most of the American states hold, that marriage and birth of issue does revoke a will, even where the statute provides for such issue.
16. The subject very elaborately considered by Surrogate Bradford.

* 17. Conclusion of this learned judge.

18. In North Carolina, the birth of a child and other circumstances not sufficient.

n. 20. Cases and opinions in different states bearing on the question.

19. The birth of a child may be an implied revocation, but change of circumstances not.

§ 24. 1. THE marriage of a feme sole is such an entire change in her condition and relations, that it is generally held to work a revocation of her will, executed before that event.[1] And the result was the same even where she survived her husband, and was thus restored to her former condition.[2]

2. The marriage of a man, for obvious reasons, is not, upon general principles, considered as having the same effect. But marriage, and the birth of issue, is commonly regarded as having such an effect upon his condition and relations in life, that a prior will is thereby revoked.[3] And the rule is not confined to an unmarried testator,[4] but applies to the case of one whose wife subsequently deceases, and he marries again, and has issue of the subsequent marriage.[4] This point was a good deal discussed in the English courts, and was long held in doubt, especially in regard to the effect produced by the marriage and birth of issue upon a devise of real estate.[5]

* 3. It seems never to have been decided, in the English courts, whether, if the testator have other children of an existing marriage, after the making of his will, and then survive his wife and marries again, but have no child of the after marriage, this will be in law a revocation. The Master of the Rolls, in Gibbons *v.* Caunt,[5] seemed to suppose the order of the events could make no difference.[6]

4. It has been held, that marriage and the posthumous birth of a child, will have the effect to revoke the will of the father, since the effect in producing revocation, in such cases, is not dependent

[1] Forse & Hembling's Case, 30 and 31 Eliz. in Com. Banc., 4 Co. Rep. 60, 61. "It was [here] adjudged, on great deliberation, that the taking of a husband, and the coverture at the time of her death, was a countermand of the will." Hodsden *v.* Lloyd, 2 Br. C. C. 534.

[2] 1 Jarman, Eng. ed. 1861, 114; Cotter *v.* Layer, 2 P. Wms. (623), (624); Doe d. *v.* Staple, 2 Term Rep. 685, 696, *Kenyon*, Ch. J.

[3] This rule is deduced from the Civil Law. Just. Inst. Lib. 2, cap. 13, sec. 5. Qui filium in potestate habet, curare debet, ut eum, hæredem instituat, vel exhæredem eum nominatim faciat.

[4] Christopher *v.* Christopher, cited in 4 Burr. 2182; s. c. Dick. 445; 1 Jarman, Eng. ed. 1861, 115.

[5] Overbury *v.* Overbury, 2 Show. 242; Lugg *v.* Lugg, 2 Salk. 592; 1 Ld. Raym. 441; 12 Mod. 236; Brown *v.* Thompson, 1 Eq. Cas. Abr. 413, pl. 15; Eyre *v.* Eyre, 1 P. Wms. 304, in n. *a*. See also, Parsons *v.* Lanoe, 1 Vesey, 189, 192; Amb. 557; Gibbons *v.* Caunt, 4 Vesey, 840, 848, and Am. note.

[*6] 1 Jarman, Eng. ed. 1861, 116.

upon any supposed change in the mind of the testator, but is a merely legal presumption, altogether independent of any voluntary action, or purpose, on the part of the testator.[7] And although it seems once to have been supposed, that the death of the issue, contributing to produce the revocation, during the life of the testator, would defeat the result, it seems now to be held otherwise.[8]

5. But it seems to be considered, in the English courts, that the subsequent marriage and birth of issue, will not operate as a revocation of the will, where the father, before making his will, or contemporaneously with it, makes express provision, by a separate deed or instrument, for such future issue.[9] It seems to be considered in this, and other analogous cases, that the testator, by making specific provision, by another instrument, for future issue of a contemplated, or possible marriage, puts the case out of the rule of the implied revocation from such events.[10] And if the rule is based, as Lord *Ellenborough*, in Kenebel *v.* Scrafton, seems to suppose, upon the ground upon * which it is placed by Lord *Kenyon*, in Doe *v.* Lancashire,[11] there can be no question of the soundness of the distinction.

[7] Lord *Kenyon*, Ch. J., in Doe d. *v.* Lancashire, 5 Term Rep. 49, 59; Israel *v.* Rodon, 2 Moore, P. C. C. 51; Matson *v.* Magrath, 1 Rob. 680.

[8] 1 Jarman, 118, 119; Wright *v.* Netherwood, 2 Salk. Ev. Ed. 593, in note; Emerson *v.* Boville, 1 Phillim. 342; cases cited, 1 Phillim. 343.

[9] Kenebel *v.* Scrafton, 2 East, 530.

[10] Lord *Mansfield*, Ch. J., in Brady *v.* Cubitt, Doug. 31, 39.

[11] 5 Term Rep. 58, 59. His lordship here treats it as being "a tacit condition annexed to the will itself, when made," that it shall not take effect, if there should be a total change in the situation of the testator's family. And Lord *Ellenborough* adds, "and *a total want of provision* for the family so newly circumstanced." 2 East, 542. This case of Kenebel *v.* Scrafton, seems to have been overlooked by the learned judge, Sir *C. Cresswell*, in the recent case of Re Cadywold, 1 Swab. & Trist. 34; 27 L. J. Prob. 36, from which the editors of the late edition of Jarman infer, that the decision, although very recent, will not be regarded as law. 1 Jarman, 116, in note.

It seems to us, that, in this class of cases, the instrument whereby such issue is provided for after the death of the testator, may justly be regarded as of a testamentary character, and virtually forming a portion of the testamentary act; and that the admission of such proof does not come within the rule excluding parol evidence, but that it is nothing more than proof of all the contemporaneous writings executed by the testator, which it is common to construe together as one transaction. And where the provision is altogether anterior to the execution of the will, it does nevertheless travel forward, and become a part of the testamen-

6. It seems, from the English cases, that the future marriage * of the testator, and birth of issue, will only operate a revocation, where the will, either in terms, as by a residuary clause, or in some other mode, disposes of all the testator's estate.[12]

7. It has been claimed, that the descent of an estate upon after-born issue, shall operate to prevent the implied revocation, but it would seem, that upon principle, it should not have this effect.[13]

8. There has been a good deal of discussion in the English courts, in regard to the admissibility of parol evidence to rebut this implied revocation, and many dicta of eminent judges will be found, to the effect that such testimony is admissible. But the question came before all the judges, in the Exchequer Chamber,[14] in Eng-

tary act, by adoption, inasmuch as it is in its very nature a portion of the testator's disposition of his estate, to take effect only after his death.

And even where such provision for future issue is not made to depend upon the event of the father's death, so as to make it of a testamentary character, it would seem important to be considered, by the court, in giving construction to the will, in order to learn the circumstances and condition of the testator's property and family, so as to place themselves in his precise attitude, in order to enable them to view and consider his language from his stand-point, that they may be able the more clearly to comprehend its import. And the same rule equally applies, where the provision for such after-born child is made, not only at a different time from the execution of the will, but by some other person; and even where such provision is made, either by the testator or another, after the execution of the will, it seems equally proper it should be considered in giving a construction to the will, since the will, for most purposes, is regarded as speaking from the death of the testator; and all such provisions, although made after the date of the will, in legal contemplation, exist at the time the will becomes operative, and may therefore properly be considered as showing the condition of the subject-matter. The Earl of Illchester, Ex parte, 7 Vesey, 348.

* [12] Lord *Mansfield*, Ch. J., in Brady *v.* Cubitt, Doug. 39, Lord *Ellenborough*, Ch. J., in Kenebel *v.* Scrafton, 2 East. 541, and *Tindal*, Ch. J., in Marston *v.* Roe d. Fox, 8 Ad. & Ellis, 57.

[13] Marston *v.* Roe d. Fox, 8 Ad. & Ellis, 14, 57. In this case, the court considered, that the issue took only a mere legal estate, so that the question of the effect of a substantial inheritance did not arise. The revocation will not take effect, except in cases where the issue is capable of inheriting the property disposed of by the will, as where the former children, one or more being a son and heir, inherit the estate, being only of the realty. Sheath *v.* York, 1 Ves. & B. 390.

[14] Marston *v.* Roe d. Fox, 8 Ad. & Ellis, 14. The cases are here very extensively reviewed by *Tindal*, Ch. J. And while it is fully admitted, that according to the declaration of Lord *Mansfield*, in Brady *v.* Cubitt, Doug. 39, that the presumption of revocation from marriage and the birth of issues, like all other presumptions, "may be rebutted by every sort of evidence," it was nevertheless determined,

land, and after very elaborate argument, by such eminent counsel, as Lord Campbell, then Attorney-General, and * Sir William Follett, it was declared, in a masterly judgment, delivered by *Tindal*, Ch. J., C. B.:

9. That where an unmarried man, without children by a former marriage, devises all the property he has, at the time of making his will, and leaves no provision for any child of a future marriage, the law annexes to such will the tacit condition that, if he afterwards marries, and has a child born of such marriage, the will shall be revoked. And it was further held, that evidence, not amounting to proof of republication, cannot be received in a court of law to show that the testator meant his will to stand good, notwithstanding the subsequent marriage and birth of issue:

10. Such revocation is not prevented by a provision in the will, or otherwise, for the future wife only. The children of the marriage must also be provided for. It was here intimated, that such revocation is not prevented, if property, acquired by the testator after making his will, descend upon the child of such marriage, after the testator's death. It is clearly so, where such child takes only the legal estate. This decision seems to have settled the law in the English courts upon all the questions involved. It is evident that the effect of this mode of revocation rests upon the legal operation of the act of marriage and the birth of issue, and in no sense upon the intention or presumed purpose of the testator; since where a native of one of the German states became permanently domiciled in England; and had been naturalized by act of parliament, and subsequently went to Frankfort, and there married a sister of the half-blood of his deceased wife domiciled there, with a view to subsequent residence in England, such marriage being valid both by the laws of Frankfort and of his native state, and immediately returned to England, where he resided until the time of his death; it was held that a will made before such mar-

that in the language of Ch. J. *Eyre*, in Holford *v.* Otway, 2 H. Bl. 522, "in cases of revocation by operation of law, . . . the law pronounces upon the ground of a presumptio juris et de jure, that the party did intend to revoke, and that presumptio juris is so violent that it does not admit of circumstances to be set up in evidence, to repel it." The case of Brady *v.* Cubitt is here referred to, and it is said to be difficult to understand it, as a "revocation by operation of law." But *Tindal*, Ch. J., in Marston *v.* Roe, supra, is very explicit in declaring that Brady *v.* Cubitt "rests upon other grounds, which are altogether satisfactory," namely, that the will disposed of *only part* of the estate.

riage was not revoked by it, the same being void by operation of the English statutes.[15] But, under the present English statute, marriage, which operates to revoke a will, so far as it operates to dispose of the testator's own estate, will not have that effect as to that portion of the same instrument made in execution of a power of appointment.[16]

11. By the recent English statute, wills are held absolutely revoked by the subsequent marriage of the testator, whether made by a man or woman, unless such will be made in execution of certain specified powers; and it is further provided, that no will shall be revoked, by any presumption of intention, on the ground of an alteration of circumstances.

12. The doctrine of the American courts will be found to coincide with the principles above stated. The question was very elaborately reviewed, at an early day, by the most eminent of the American chancellors, and the conclusion declared, upon a thorough examination of the cases, from the days of Cicero[17] * forward, that the subsequent marriage and birth of a child, are an implied revocation of a will, either of real or personal estate; but such presumptive revocation may be rebutted by circumstances. It seems that a subsequent marriage or birth of a child alone will not amount to a revocation.[18]

13. The same conclusion was reached by *Shaw*, Ch. Justice, after a careful examination of the authorities, in a recent case,[19] in Massachusetts. The statute in that state, and many other of the American states, provides for all children omitted in the will of the parent, unless it appear that such omission was intentional; and this extends to children born after the making of the will, as well as others.[20]

[15] Mette *v.* Mette, 28 L. J. Prob. 117. There seemed no question here that the testator regarded this marriage as entirely valid during his whole life, and it might have been so regarded by the court of his native state; but the English courts, holding it legally void, considered it could have no effect upon the will.

[16] Mason in re, 30 L. J. Prob. 168; Digest, 7 Jur. N. S. 190.

[17] De orat. lib. 1, c. 38. The case here referred to, is the familiar one of the father giving his estate by will to a stranger, upon the mistaken belief that his son was dead. On the petition of the son, he was reinstated in the inheritance, by the Centumviri. And a similar case is mentioned in the Pandects, Dig. 28, 5, 92, where the will was set aside by the Prince.

[18] Brush *v.* Wilkins, 4 Johns. Ch. 506.

[19] Warner *v.* Beach, 4 Gray, 162.

[20] Bancroft *v.* Ives, 3 Gray, 367. Children so unprovided for, are to have the

14. A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncancelled, does, in effect, reaffirm it, from day to day, until the termination of his conscious * existence. Hence it was decided, that the revocation of a will cannot be implied from the death of the testator's wife, and one of his children, leaving issue; and the birth of another child contemplated in the will; and the continued insanity of the testator for forty years, from soon after the time of making the will, until his death; and a fourfold increase of the value of his property, so as greatly to change the relative proportion given to the children, whose legacies were specific, and those made residuary legatees.[21]

15. Since most of the American states have made special provisions, by statute, in favor of children unintentionally omitted, in the will of the parent, this point becomes a far less important consideration in regard to wills here, than where no such statutory provisions exist. But wherever the question has arisen, it has generally been held, even in the states where by statute, children omitted in the will of the parent are entitled to the same share of his estate, as if he had died intestate, that marriage and the birth of issue, after the making of a will, does amount to an implied revocation of the will.[22]

same share in the estate, as if there had been no will. Under the present Massachusetts statute it has been decided, that extrinsic evidence is receivable to show that any of the testator's children were not omitted in his will, unintentionally. Wilson *v.* Fosket, 6 Met. 400. The rule was otherwise under the former statute. *Dewey*, J., 6 Met. 404. But this provision in favor of children unintentionally omitted in the will of the parent, cannot be extended to illegitimate children, so as to enable them to take the same share of the mother's estate, where so omitted in her will, which they would if she had died intestate. Kent *v.* Barker, 2 Gray, 535.

The unintentional omission of any child, will not be a sufficient ground for such child to oppose the probate of the will. Doane *v.* Lake, 32 Me. 268. This provision of the Mass. Rev. Stat. has been held to extend only to cases affecting estates belonging to the testator in his own right, and not to such as he may have a power of appointment over. Blagge *v.* Miles, 1 Story, C. C. 426.

[21] Warner *v.* Beach, 4 Gray, 162. The English statute is specific upon this subject. Ante, pl. 11; Verdier *v.* Verdier, 8 Rich. (S. C.), 135.

[22] Wilcox *v.* Rootes, 1 Wash. (Va.), 140; Brush *v.* Wilkins, 4 Johns. Ch. 506; Warner *v.* Beach, 4 Gray, 162. The Penn. Stat. 1794, made such facts only a revocation of the will, as to the widow and child. Coates *v.* Hughes, 3 Bin. 498. The question is here very elaborately discussed, upon general principles, by counsel, and by *Tilghman*, Ch. J., and the conclusion reached, that the subsequent

* 16. This subject was very elaborately considered by a very laborious and painstaking judge, of considerable eminence, in the marriage and birth of issue, do in all cases work an implied revocation of the will, except so far as that result is qualified or controlled by statute. Walker *v.* Hall, 34 Penn. St. 483. In Havens *v.* Van Den Burgh, 1 Denio, 27, the doctrine is thus stated: Marriage, and the birth of a child, are an implied revocation of a will previously made, disposing of the testator's whole estate, where there is no provision, in or out of the will, for such new relations; and it makes no difference whether the testator had children at the date of his will, or not. It is here held, that the presumption of revocation may be rebutted by circumstances. The court here says, "Slight circumstances, in some cases, have been held sufficient to destroy the presumption of a revocation, arising out of the change in the testator's family." But it was here considered, that the existence of an unexecuted will, found among the testator's papers, which was similar in most of its provisions to the executed will, but making provision for the after-born child, where the paper was not in the testator's handwriting, and their was no evidence under what circumstances it was prepared, or why it was not executed, was not sufficient to rebut the presumption of a revocation. By the New-York Rev. Stats. vol. 2, ch. 64, § 45, if the will disposes of the whole estate, and the testator afterwards marry and have issue, and either the wife or issue be living at his death, the will is revoked, unless such issue be, in some way, provided for, or it appears, from the will itself, that there was an intention not to make any provision for such issue. 4 Kent, Comm. 527.

Under the statute of Ohio, the birth of a child operates as the revocation of the testator's will, and the fact that the testator survived the child, did not revive it. Ash *v.* Ash, 9 Ohio, N. S. 383.

The statutory provisions in Pennsylvania are, that the marriage of a single woman revokes her will, and it is not revived by the death of her husband. The marriage of a man after making his will operates a revocation, as to his widow, or any after-born child unprovided for, but the revocation is only as to such widow or child or children being unprovided for in the will. Walker *v.* Hall, 34 Penn. St. 483. Thus in the late case of Edwards' Appeal, 47 Penn. St. 144, it was decided that marriage, after the making of a will, revokes it as to the widow of the testator; and the birth of a posthumous child, not provided for in the will, has the same effect. The testator by his will, being unmarried, directed the sale of his real and personal estate, and the investment of the proceeds, and the payment of the interest to the lady whom he afterwards married. After his death, a son was born, who was not provided for in the will; and it was held that the will was revoked both as to the widow and son, and that the estate must be distributed as in cases of intestacy.

In Ohio, if a person make his will, having no children, and one is subsequently born to him, it will operate as a revocation of the will. Under this statute, one is held not to have children, within the meaning of the statute, until after their actual birth. And where one made his will within six months of the birth of a son, and had deceased, and the will was admitted to probate in the mean time, it was held that the birth of the child had the effect to avoid the will, notwithstanding the probate; and that such child could recover the land of his ancestor, of the devisee,

case of Bloomer *v.* Bloomer,[23] where the learned judge says: "We find the ecclesiastical courts very early adopted the rule, that marriage and the birth of a child revoked a will of personalty, and the same principle was ultimately, but not without a struggle, applied to devises of real estate. Finally, it was held, that it was not necessary that a subsequent marriage and birth of a child should both concur, but that the birth of a child alone, in connection with other circumstances, might be sufficient to raise an implied revocation."[24]

* 17. "There is so much sound wisdom and natural equity in this conclusion, that it has been received very generally, and, with various modifications, been adopted in the statutes of nearly all the states, either to the extent of revoking the will entirely, or pro tanto, so as to let in the children born after the will was made."

18. But in the State of North Carolina,[25] it seems to have been considered, that the declarations of the testator, in his last sickness, that he desired to make another will, providing for a child born after the execution of the one then existing, and the fact that he was persuaded by the physicians to delay the matter, in connection with the fact of such child being unprovided for in the will, or otherwise, is not sufficient to show a revocation of the will.

19. In Pennsylvania, it is provided by statute, that the subsequent birth of issue is, in itself, a revocation of a will.[26] But great

without any previous proceeding under the statute direcctly impeaching the probate by contest. Evans *v.* Anderson, 15 Ohio St. 324.

In the State of Illinois, where the husband and wife are made heirs to each other, marriage by the testator, after making his will, wherein no provision in contemplation of such new relation exists, amounts to a revocation. Tyler *v.* Tyler, 19 Illinois, 151.

[23] 2 Bradf. Sur. Rep. 339.

[24] The learned judge here cites Johnston *v.* Johnston, 1 Phillim. 447; *Marston *v.* Fox, 8 Ad. & Ellis, 14. The former case sustains the last proposition of the learned judge, but it has not been extended, we think, to real estate, in the English courts, and the case last cited above, seems at variance with the proposition for which it is cited. We have before said, we consider the case of Marston *v.* Fox as the most authoritative declaration of the law in the English courts, in regard to receiving extrinsic evidence to rebut the presumption of revocation; and it seems even more objectionable to receive such evidence for the purpose of creating the presumption. In regard to the construction of the Mass. statutes upon this subject, see Church *v.* Crocker, 3 Mass. 21 et seq. and cases cited.

[25] M'Cay *v.* M'Cay, 1 Murph. 447.

[26] Tomlinson *v.* Tomlinson, 1 Ashm. 224; Young's Appeal, 39 Penn. St. 115.

change in pecuniary circumstances, and some in the social relations and moral duties of the testator, will not amount to an implied revocation of his will.[27] And in New York, where a seaman in 1813, being then married, and having two children, one of whom outlived him, made his will, and afterwards had several children, three of whom survived him, and in 1849, being * then wealthy, he began the draft of a writing, indicating a purpose to dispose of his estate, which was found incomplete and unsigned among his papers, it was held, that the will of 1813 was revoked by implication or presumption of law.[28]

SECTION II.

REVOCATION; BY BURNING, CANCELLING, TEARING, OR OBLITERATING.

1. The act must be done, with intent to revoke, animo revocandi.
n. 1. Lord Mansfield's illustrations of such acts, without the animo revocandi.
2. Where one part of duplicate wills is cancelled, animo revocandi, it is a revocation.
3. But if done by accident, or under misapprehension, no revocation.
4. So, too, it will be effectual if the testator is made to believe it so.
5. Lord Ch. J. De Grey's rule, that the slightest burning, with intent to revoke, sufficient.
6. But if there is no such act as the statute requires, the intent of the testator not sufficient.

[27] Verdier *v.* Verdier, 8. Rich. (S. C.), 135.

* [28] Sherry *v.* Lozier, 1 Bradf. Sur. Rep. 437. And it was held in this case, that the provisions of the Revised Statutes did not apply to the revocation of wills, where such revocations were executed before they came into operation, but that such wills can only be revoked by the same formalities requisite to make a valid will when such will was made. But to prevent misapprehension, it may be proper to suggest here, that upon general principles, the law, applicable to the revocation of wills at the time of the act of revocation, must govern in regard to its validity. And the general rule in regard to the validity of the act of revocation is, that it must possess all the solemnities required in the execution of a valid will. The mere intention to revoke, no matter how clearly and frequently expressed, is not sufficient. Nelson *v.* Public Administrator, 2 Bradf. (N. Y.), 210.

In the American states, it is a general principle prevailing throughout the country, more commonly by express statutory provision, that the birth of a child after the making of a will, either operates as a revocation of such will pro tanto, or, what is the same thing, entitles such after-born child to share in the estate, the same as if the parent had died intestate. Bloomer *v.* Bloomer, 2 Bradf. Sur. Rep. 339.

*7. Where testator is arrested in his purpose before completing what he intended, no revocation.

8. Will in testator's custody, lost or mutilated, presumptive of revocation, but not so, if in that of another.

9. Alterations in pencil, prima facie, deliberative, but may be proved final.

10. Partial alterations revocation pro tanto. Conditional revocations not final.

11. Revocations under misapprehension of fact invalid, but not so in regard to mistake of law.

12. Revocation of later will may, or may not, restore former one. Revocatory clause in latter makes no difference.

n. 6. Discussion of the point of effectual revocation by Patteson, J., and Lord Denman, Ch. J.

13. Presumptive revocation from destruction of duplicate, if the other part not in testator's custody.

14. More doubt where both parts in testator's custody, and one only is destroyed.

15. Alteration of one part presumptive of alteration of will. So, too, in regard to codicil.

n. 26. Effect of sudden changes of mind in regard to revocation.

16. Codicil presumptively dependent upon the will, but this may be disproved.

17. But where no dependence of codicil upon will, it may be upheld by itself.

18. Cutting is "tearing." It may extend to revoke the whole will, or a part only.

19. Tearing off name of witnesses, or defacing them, presumptively a revocation.

20. Tearing off seal, animo revocandi, is a revocation, although seal not necessary.

21. Accidental destruction, or deliberative alterations, do not amount to revocation.

22. Erasures supplied by alterations informally executed, remain, if legible; otherwise, blanks.

23. Alterations and interlineations in a will presumptively made after its execution.

24. But where blanks merely are filled, it is presumed to have been done before execution.

25. Witnesses must rewrite their names to create a reëxecution.

26. By the late English statute, revoking later will does not revive former, unless so stated.

27. Extrinsic evidence not admissible to control revocation, or republication.

28. Testator cannot delegate authority to revoke his will.

29. Those interested in estate must pay legacies, if they suppress the will.

30. American cases require the animum revocandi and the statutory act.

31. Some American cases dispense with the act, if testator was made to believe he had performed it.

32. But these cases carry that rule too far. It only estops the parties to the fraud.

33. The American cases generally adopt the rule, that the act and the intent must concur.

34. Exposition of the subject by Chief Justice Ruffin.

35. The cases in America, and in England, require the revocation to be in the present tense.

*36 and n. 61. Rule unsettled, whether destruction of later will revives former one.

37. Mental soundness is as requisite to the revocation, as the making of a will.

38. Part of a will, or of a formal act of revocation, may be held valid, and other parts not.

39. The effect of erasures and interlineations in will, as to proof and trial, discussed.

40. The rule of the American courts the same as the English, in this respect.

41. Making an alteration of will, in presence of original witnesses, upheld.

42. Alterations in ograph wills valid, without attestation, in some states.
43. Alterations without consent of testator have no effect, except as to party making them.
44. Portions of a will may he revoked by erasure.
45. Revocation not dependent upon disposition of the estate. Effect of revoking later will.
46. Revocations by means of fraudulent imposition upon testator.
47. Must he some outward act.
48. If the will was last heard of in testator's custody, and cannot be found, it is revoked.
49. The act of revocation may be dependent upon the future dispositions, and thus fail.
50. Recent decision in New Jersey, confirming the general rule.
51. The presumption of revocation from mutilation in the custody of testator rebutted.
52. The declarations of testator to prove revocation not admissible, except as part of res gestæ.
53. Will is not revoked by mere abandonment. Some other act requisite. Presumption.
54. The same rule applies as to the date of mutilations as of alterations.

§ 25. 1. THE modes of revocation of wills by defacing the paper, named in the English statute of frauds (Car. II.), are by "burning, cancelling, tearing, or obliterating the same;" and in the present English statute of wills, "by burning, tearing, or otherwise destroying." But it has been often determined, in the construction of these statutes, that the mere acts named will not constitute a valid revocation unless done with the intent to revoke.[1]

*2. Where there are duplicates of the will, and the testator cancels the one in his custody, that is an effectual revocation of the whole will, if done with that intent.[2]

3. And in the report of this case in another place,[3] Lord Chancellor *Cowper* is reported to have said, that where a former will is cancelled by mistake, or upon presumption that a later will is good, which proves void, this will not let in the heir, being done by mistake it is relievable in equity, on the score of accident; and a

[1] Burtenshaw *v.* Gilbert, 1 Cowp. 49. Lord *Mansfield* here explains very graphically the acts which might often occur, which would destroy the writing, but without revoking the will. As if a man were to throw ink upon his will, instead of sand; or, having two wills of different dates, should direct the former to be destroyed, and by mistake the latter is cancelled. In neither case would it amount to a revocation of the will, although the writing were irrevocably gone.

[2] Onions *v.* Tyrer, 2 Vern. 741; Sir Edward Seymour's case, cited in Burtenshaw *v.* Gilbert, Cowp. 49.

[3] 1 Peere Wms. 345. But this case is doubted by Lord *Mansfield*, in Burtenshaw *v.* Gilbert, supra.

perpetual injunction was issued against the heir, and that the devisee should enjoy.[4]

4. And where the testator called for his will, which was handed him while in bed, and he gave it "something of a rip with his hands, and so tore as almost to tear a bit off, then rumpled it together and threw it on the fire, but it fell off," and one of the servants took it up and preserved it, or it would soon have been burnt up; and the testator being informed it was not destroyed constantly insisted it should be, until he was finally informed it had been, it was held a sufficient revocation.[5]

5. Lord Chief Justice *De Grey* here said: "The statute has specified four" modes of revocation, "and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation." "Throwing it on the fire, with an intent to burn, though it is only very slightly singed and falls off, is sufficient within the statute."

* 6. But in another case, where the testator attempted to destroy his will by throwing it upon the fire, from whence it was snatched by an inmate of testator's house in whose favor it had been made, before any impression was made by the fire upon the will itself, one corner of the envelope only being burned; and who subsequently persuaded the testator that she had destroyed it, after great importunity on his part, it was held not to amount to a valid revocation, not being in any of the modes prescribed by the statute.[6]

[4] Swinburne, pt. 7, sec. 16, pl. 4. Cases here named wherein the cancelling in fact is not valid in law are, where it was "done unadvisedly" by the testator, or "by some other person without the testator's consent, or by some other casualty."

[5] Bibb *v.* Thomas, 2 W. Bl. 1043. See also, Hyde *v.* Hyde, 1 Eq. Cas. Ab. 408, 409.

[6] Doe d. Reed *v.* Harris, 6 Ad. & Ellis, 209, 218. In this case, *Patteson*, J., who presided at the trial, charged the jury, "That if they were satisfied that the testator threw the will on the fire, intending to burn it, that A. H. took it off against his will, that he afterwards insisted upon its being thrown on the fire again, with intent that it should be burned, and that she then promised to burn it, there was a sufficient cancellation within the statute." But the court ordered a new trial. Lord *Denman*, Ch. J., said, "It would be a violence to language if we said there was any evidence to go to the jury of the will having been burnt." And it was further held, that there could be no virtual revocation. The fact and the intent must concur. The judges all agree that here was no act of burning, and the mere intent and belief of the fact will not make a valid revocation under the statute. But upon the question arising between the same parties and upon the same will, in reference to copyhold estate, which is regarded as personalty,

7. And where the testator is arrested in his purpose, and changes his determination to revoke his will, before the act is completed, by which he designed to express his intention. As where, upon sudden disaffection with one of the devisees, the testator tore his will into four pieces, but, upon being pacified, fitted the pieces together, and expressed gratification that no more had been done, saying it was "well it was no worse," it was held not to amount to a revocation,[7] the jury having found * that the testator had not completely finished what he intended to do for the purpose of destroying the will. And in a recent case the testator had torn his will nearly through, but was stopped by the remonstrance of a person present, before he had completed what he intended to do, and it was held to be no revocation.[8]

8. The rule of evidence in the ecclesiastical courts, in regard to presumptive revocations, from the absence or mutilation of the will, seems to be, that if the will is traced into the testator's possession and custody, and is there found mutilated, in any of the modes pointed out in the statute for revocation, or is not found at all, it will be presumed the testator destroyed, or mutilated it, animo revocandi; but if it was last in the custody of another, it is incumbent upon the party asserting revocation, to show the will again in the testator's custody, or that it was destroyed or mutilated by his direction.[9]

And where the testator became insane, and the will was in his custody, as well before as after he became so; the will being torn or destroyed, it cannot be assumed that he did it while insane.[10]

9. Alterations may be made in a will, as well by pencil as in ink. But where the will is written in ink, and formally executed,

to which the statute of frauds does not apply, it was held, that the will was not revived by the testator's subsequently learning that it was in existence and in the possession of the devisee, who would attempt to set it up in her favor. 8 Ad. & Ellis, 1.

[7] Doe d. *v.* Perkes, 3 B. & Ald. 489. Ch. J. *Abbott* said here, "It was a question for the jury to determine, whether the act of cancellation was complete."

* [8] Elms *v.* Elms, 4 Jur. N. S. 765; 1 Swab. & Trist. 155; 1 Jarman, 124.

[9] Hare *v.* Nasmyth, 3 Hagg. 192 n.; Re Lewis, 1 Swab. & Trist. 31; 1 Jarman, 124; Battyll *v.* Lyles, 4 Jur. N. S. 718. See Wynn *v.* Heveningham, 1 Coll. 638, 639, upon the general question of presumptions.

[10] Harris *v.* Berrall, 1 Swab. & Trist. 153.

and the testator subsequently drew a line in pencil through a clause in the will — it was held to raise no presumption of revocation, but to be merely deliberative, and indicative of some future incomplete purpose.[11]

10. Where a will is partly obliterated by the testator, this will not amount to a revocation of the unobliterated parts.[12] * Thus, where the will contained a devise to two as joint tenants, the testator striking out the name of one of the devisees, is only a revocation pro tanto.[13] Under the former English statute, where personalty passed by a will not attested by witnesses, the testator could alter the same at pleasure, without the presence of witnesses. In such a case, where the testator had drawn his pen through the name of a legatee in two places, but left it standing in two other places, it was held not to amount to a cancelling of the bequest.[14] And if the purpose of revocation was dependent upon the execution of a subsequent valid will, which had not been done, the revocation, whether in whole or in part, is incomplete.[15]

11. But if the testator destroys his will upon the mere general purpose of thereafter making another, it will not defeat the revocation being effectual, because he dies without carrying such purpose of making a new will into effect.[16] It is only where the testator revokes a former will, upon the supposition that he has executed a subsequent valid will, which proves invalid, that the act of revocation is held incomplete.[16] And where the testator destroyed a later will, supposing that would have the effect to restore an earlier one, which it did not, it was decided that this would not defeat the effect of the destruction of the later will, and that the testator must be held to have died intestate, contrary to his intention.[17]

12. The general rule seems to be firmly established from an early day, that a later will revoked, will not prevent an earlier and inconsistent one from remaining in force.[18] And it makes no

[11] Francis *v.* Grover, 5 Hare, 39. But see Mence *v.* Mence, 18 Vesey, 348.

[12] Sutton *v.* Sutton, 2 Cowp. 812.

[13] Larkins *v.* Larkins, 3 B. & P. 16. But see Short d. *v.* Smith, 4 East, 419.

[14] Martins *v.* Gardiner, 8 Sim. 73.

[15] Grantley *v.* Garthwaite, 2 Russ. 90.

[16] Williams *v.* Tyley, 1 Johns. 530.

[17] Dickinson *v.* Swatman, 6 Jur. N. S. 831 (1860).

[18] Goodright *v.* Glazier, 4 Burr. 2512.

difference whether the later will contained an express clause * of revocation or not.[19] The intimation, therefore, that a will containing an express clause of revocation is effective to annul a former will, even before the death of the testator, is without foundation, since no part of a will can become operative before the death of the testator.[20]

13. Some nice distinctions have been made in the cases, in regard to the presumptions arising from the different states in which the duplicates of a will have been found after the death of the testator. In the case of the testator's destroying all of the will in his possession, it seems clearly to raise the presumption of an intention to revoke.[21] But where both parts are in the custody of the testator, and only one is destroyed, it seems more doubtful. In the case Pemberton *v.* Pemberton, the Lord Chancellor *Erskine* expressed a decided opinion, that where the testator has possession of both parts, the presumption, from the destruction of one part, of an intention to revoke, holds, "though weaker;" and that in such case, where he alters one, and then destroys that which he had altered, the same presumption obtains, "but still weaker."[22]

14. But the presumption in the latter case seems quite as much in favor of an intention to let the duplicate which he had not altered stand, since the fact of having altered one of the duplicates explains sufficiently the reason for destroying that * one, and the fact of the other being preserved, rather looks towards the purpose of having it remain in force, after we find any sufficient reason for destroying the duplicate, which does not attach to the part preserved.[23] And where one of the duplicates, both being in testator's

[*19] Harwood *v.* Goodright, 1 Cowp. 87, 92.

[20] 1 Jarman, 128, and notes. The ecclesiastical courts seem to have receded from this doctrine, and in the case of Usticke *v.* Bawden, 2 Add. 116, to have determined that the question of the revival of the former will, by the cancellation of a later one containing a revocatory clause, is entirely open to be determined according to facts and circumstances. And in the very recent case of Colvin *v.* Warford, 20 Md. 357, it seems to be considered that an express clause of revocation in a will operates to supersede the will thus revoked, but that it will be again restored by the destruction of the revoking will. See also James *v.* Cohen, 3 Curteis, 770; 8 Jur. 249; post, § 28.

[21] Ante, pl. 2, and note.

[22] 13 Vesey, 290. But his lordship was compelled to yield his opinion of the presumed intention to revoke in the particular case, in deference to the testimony offered, and the occurrence of four successive verdicts in favor of the devisee.

[*23] 1 Jarman, ed. 1861, 129.

custody, was found mutilated, and the other carefully preserved, it was held the will remained unrevoked.[24]

15. But it seems to have been determined, as late as 1849, that the English rule in regard to the erasure of one part of a will executed in duplicate, is to be regarded as prima facie an alteration of the whole will.[25] And so, too, where the testator had expressed the same purpose both in the will and codicil, and obliterated it in the codicil only.[26]

[24] Roberts *v.* Round, 3 Hagg. 548.

[25] Doe d. Strickland *v.* Strickland, 8 C. B. 724. The language of the learned judge, B. *Alderson*, at the trial, in addressing the jury, was, "That if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will so altered became the last will of the testator."

[26] Utterson *v.* Utterson, 3 Ves. & B. 122. This was a case where the father, becoming disaffected with one of his sons, attempted to cut him off with a shilling, by an interlineation to that effect in his will, and subsequently executed a codicil to the same effect. But on becoming reconciled to his son, he cancelled the codicil by drawing his pen across it, but did not strike out the interlineation in his will: the question arose, whether such interlineation could be regarded as part of his will as to personalty, it being clear that it could not affect realty, under the statute of frauds, not having been properly executed, and the court were clearly of opinion that it must be regarded as cancelled by the act, the same purpose being more formally expressed and duly authenticated in the codicil.

Mr. Jarman, in his excellent work, appends, in a note to his abstract of the above case, a most expressive caution to testators, who become suddenly disaffected with any of the donees in their wills, against allowing themselves to make any alteration of their wills, expressive of their indignation, lest it might have the effect to wound the feelings of, or to affix a stigma upon, such donee, long after the transaction would be gladly forgotten by all connected with it.

There is great force and candor in the suggestion. And there is another matter, closely associated with this, in regard to which it may not be deemed out of place to give a single hint, as to the proper course to be pursued by professional gentlemen, when applied to for the purpose of consummating such rash purposes of testators, or of making any testamentary act for another, while under the influence of indignation or rage, on account of the supposed, or even the actual, misconduct of those, having in the course of nature a just claim to be remembered in their wills; that is, how far it is consistent with professional good faith, to be accessory to carrying such a purpose into effect. Such an one, while in such a state of frenzy and excitement, is little more in a fit condition to execute so solemn an act as making his will, than if he were laboring under positive insanity. The very least which an honorable professional man could do, under such circumstances, would be to dissuade the testator from his rash purpose, and to insist upon his delaying till he had maturely considered it.

* 16. We have before adverted to a recent case,[27] where it was decided that the codicils are dependent upon the will, and that the destruction of the latter was an implied revocation of the former; and that it is for the party applying for the probate of a codicil alone, to show that the deceased intended that it should operate separately from the will. This is sometimes susceptible of being determined with reasonable certainty, from the frame of the codicil. If it be entire and intelligible, in itself alone, and especially when it contains an effective distribution of all, or most, of the testator's estate, and was found carefully preserved by the testator, in a place where he must, or naturally would, have been aware of its existence, it will afford very strong presumption of an intention to have it operate. But where these circumstances are wanting, or others indicating a contrary purpose exist, it may require a different consideration, as where the dispositions of the codicil are so complicated with, and dependent upon, those of the will, as to be incapable of a separate and independent existence.[28]

* 17. But Sir *Herbert Jenner Fust* held,[29] where the testator made provision for an illegitimate child and its mother, by a codicil which he declared should be taken as part of his will, such child being born after the making of the will, and the will not being found, at the decease of the testator, that the codicil should be treated as unrevoked, there being nothing to show an intention to revoke it, and its provisions being in favor of those to whom the testator owed a moral duty, but one not recognized by the municipal law, and the

[27] Grimwood *v.* Cozens, 5 Jur. N. S. 497 (1859).

[28] Usticke *v.* Bawden, 2 Add. 116; 1 Jarman, 130. It seems to be the general rule in the ecclesiastical courts to involve the codicils in the revocation of the will, unless a contrary intention can fairly be gathered, either from the structure of the codicils or from extrinsic evidence. Medlycott *v.* Assheton, 2 Add. 229; Coppin *v.* Dillon, 4 Hagg. 369; 1 Jarman, 131 and notes; ante, § 23 *a*, pl. 11. Where it appears, either from the manner of cancelling the will and not cancelling the codicil, or from extrinsic evidence, that the testator intended only to revoke the will and let the codicil remain in force, probate will be granted of that alone. Harris in re, 3 Sw. & Tr. 485; s. c. 10 Jur. N. S. 684. A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will. Ellice in re, 33 Law J. Prob. 27.

[29] Tagart *v.* Squire, 1 Curteis, 289; 1 Jarman, 131, and cases cited. The present English statute, as well as those of the different American states, contains many specific provisions in regard to the mode of revocation, and the effect of different acts, none of which would it be desirable to recapitulate, except in connection with cases giving construction to such provisions.

provisions of the codicil having no dependence upon those of the will.

18. In regard to the construction of the word "tearing," it must be much the same under different statutes where the word is used. It has been held to include cutting.[30] It need not be * the cutting up of the whole will. Any part cut out, as the name of a legatee, will be a revocation pro tanto.[31] And the cutting out of the principal part, as the signature of the testator, or of the witnesses, will be a revocation of the whole will,[32] as where the will was found in a wrapper in the testator's locked drawer, with other papers, and had been cut in two pieces imediately above the signatures of the witnesses and the testator, but both parts preserved, Sir *C. Cresswell* said, "I cannot come to the conclusion that the deceased did not mean to revoke his will by thus cutting it."[33]

19. And where the will was found with another testamentary paper, but the place in which the names of the attesting witnesses should have appeared upon the latter was scratched over with a pen and ink, so that no letter of a name could be deciphered, it was held, that this paper was thereby revoked, and the will was admitted to probate alone.[34] In a late case, the will remained

[30] Hobbs *v.* Knight, 1 Curteis, 768; Re Cooke, 5 Notes Cas. 390. See also, Clarke *v.* Scripps, 16 Jur. 783; 2 Rob. 563; 1 Jarman, 132. In a very late case (1863) where the testator cut a piece out of his will, after it had been duly executed, and this contained the word "witnesses," and their names, saying at the time that "he had some idea of altering his will and having a new one;" but subsequently, on the same day, re-fastened the piece he had so cut out, saying, "his will would do for the present, and if he wanted another will made he could do it afterwards;" but he died without making another will. The court, on motion, but by consent of those opposing the will, granted probate of the same. Ecles in re, 2 Swab. & Trist. 600. If the objection had been persisted in it must have been fatal, it would seem, since the cutting was evidently a perfected revocation, and the restoration of the paper would scarcely restore the will, unless it appeared that the testator repented and restored the piece cut out before he had done all that he intended to do. But see Coleman in re, 30 Law J. * Prob. 170, where one of the witnesses' name being written upon an erasure, it appeared that the testator had erased the name, and afterwards procured the witness to rewrite it, probate was granted, all parties in interest being satisfied. This case seems obnoxious to the same criticism as the last preceding one.

[31] Re Cooke, 5 No. Cas. 390; Re Lambert, 1 Notes Cas. 131; 1 Jarman, 132.

[32] 1 Jarman, 132.

[33] Re Simpson, 5 Jur. N. S. 1366 (1859).

[34] James in re, 7 Jur. N. S. 52 (1861). The counsel opposing the probate, cited Re Cooke, supra.

intact, except that the names of the attesting witnesses and the testatum clause were torn away from the foot of the will, and certain lines and parts of lines in the body of the will were struck through with blue ink. It was held, that the act of tearing was sufficient to revoke the will, and that, unexplained, it did revoke it, and that those who set up the will must show that it was not done animo cancellandi.[35]

20. Where one had executed his will, as a sealed instrument, * and tore off the seal, animo revocandi, it was held a sufficient revocation, notwithstanding the statute did not require a seal.[36] And this case seems to have been viewed with approbation by Vice-Chancellor *Wood*, a high authority, when he determined, that a testator, having torn off the signature from the first four sheets of his will, and struck his pen through the signature upon the remaining sheet, the animus revocandi being established, it was a sufficient revocation by tearing.[37]

21. Mere tearing, as well as otherwise destroying one's will, by accident, and without any intention of revocation, will not have any legal effect, and this may always be shown, by extrinsic evidence, as that it is the effect of wear only.[38] And where the act is

[35] Abraham *v.* Joseph, 5 Jur. N. S. 179.

[36] Price *v.* Powell, 3 H. & Nor. 341. And where the will was found in the testator's private desk, with the seals of the envelope broken, and a black line drawn through the name of the testator, and there was no evidence how or with what intent it was done, it was held a sufficient revocation. Baptist Church *v.* Robbarts, 2 Penn. St. 110. See also, Davies *v.* Davies, 1 Lee, Eccl. Rep. 444; Lambell *v.* Lambell, 3 Hagg. 568. Mr. Justice *Coleridge*, in Doe d. Reed *v.* Harris, 6 Ad. & Ellis, 209, 218, gives a very lucid explanation of the import of the words used in the statute of frauds, as a means of revocation of wills. "The question is put whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury, with intent to revoke, as destroys the *entirety of the will;* because it may then be said, that the instrument *no longer exists as it was.*"

Thus, where the will was written on several sheets of paper, the tearing off the signature to the last sheet, animo revocandi, will revoke the whole will, although the other signatures are left. Re Gullon, 4 Jur. N. S. 196; Gullan *v.* Grove, 26 Beavan, 64. It is held in America also, that tearing off the seal, although not an indispensable part of a will, will amount to revocation. Avery *v.* Pixley, 4 Mass. 460.

[37] Williams *v.* Tyley, 1 Johns. 530.

[38] Bigge *v.* Bigge, 9 Jur. 192; S. C. 3 N. C. 601. See also, 1 Eq. Cas. Ab. 402, pl. 3, marg.; 1 Jarman, 133, and cases cited in notes; Re Hannam, 14 Jur. 558; Clarke *v.* Scupps, 16 Jur. 783; 2 Rob. 663.

merely deliberative, showing an intention to have the revocation depend upon the testator making another will, it will not be regarded as an effectual revocation, even * where the testator had written the word "cancelled, Wm. B." across each signature, and at the end of the will, of a date later than the will, "I intend to make another will, whereupon I shall destroy this," this being signed by the testator, but not in the presence of witnesses, and no other will being found.[39]

22. Where the testator makes an alteration in his will by erasure and interlineation, or in any other mode, without authenticating such alteration, by a new attestation in the presence of witnesses, or other form required by the statute, it being presumed that the erasure was intended to be dependent upon the alterations going into effect as a substitute, such alterations not being so made as to take effect; the will therefore stands, in legal force, the same as it did before, so far as it is legible after the attempted alteration.[40] But if the former reading cannot be made out by inspection of the paper, probate is decreed, treating such illegible portions as blanks.[41] And in regard to gifts in trust, where the testator struck out the name of one trustee, and inserted two other names, and made some other alterations, but did not republish his will, it was held not to affect the gift in any other respect, except that the trustee, whose name remained legible, must act as sole trustee.[42]

23. It seems to be settled, that, from the fact of interlineations and erasures appearing upon the face of the will, no such presumption arises, as in the case of deeds and other instruments, that they were made before execution.[43] There is not * the same ground for such presumption in the case of wills, as of deeds, since a deed being made to express the definite mind of the parties, and it being a highly penal act for any one to alter it, with a view to give it a dif-

*[39] Re Brewster, 6 Jur. N. S. 56 (1860).

[40] Soar *v.* Dolman, 3 Curt. 121; Brooke *v.* Kent, 3 Moore, P. C. C. 334; 1 Jarman, 133, and cases cited; The Goods of Parr, 6 Jur. N. S. 56.

[41] Re James, 1 Swab. & Trist. 238; 1 Jarman, 133 and note.

[42] Short *v.* Smith, 4 East, 419. So also, by erasing the name of the executor, the will remains good, and the Probate Court appoint an administrator with the will annexed. 1 Jarman, 133 and notes; Sir *William Grant*, in 7 Vesey, 379.

[43] Simmons *v.* Rudall, 1 Simons, N. S. 115; Doe d. Shallcross *v.* Palmer, 16 Q. B. 747; S. C. 6 L. & Eq. 155; Re White, 6 Jur. N. S. 808; Williams *v.* Ashton, 1 Johns. & H. 115. See also, Banks *v.* Thornton, 11 Hare, 180; Cooper *v.* Bockett, 4 Moore, P. C. C. 419; post, pl. 39, n. 68.

ferent operation, the natural presumption is, that no one would do that, and hence such erasures or interlineations, as appear, are more naturally supposed to have been made at a time and in a manner consistent with honesty and fair dealing, until the contrary appear. But in regard to a will, the case is different. The act is ambulatory during the life of the testator, and it is therefore not unreasonable or unnatural to presume, that any such alterations may have been made by him with a view to the ultimate republication of the instrument.

24. And where there is a codicil to the will, which takes no notice of such alterations, the presumption is, that they were made after the date of the codicil.[44] But where a will is drawn with blanks, as for the names of legatees and the amount of legacies, which blanks are found filled up, but there is no evidence to show when it was done, the presumption is, that it was done before execution.[45]

25. Where the testator called in the witnesses to authenticate certain alterations, which he had made in his will, and they retraced their former signatures with a dry pen, and placed their initials opposite the alterations, in the margin, it was held not to amount to a reëxecution.[46]

26. By the late English statute, the rule as to revival of a former will, by the revocation of a later one, is abrogated, "unless * a contrary intention shall be shown," and revival can only take effect under that statute, by a reëxecution of the will itself, or by the due execution of a codicil, showing an intention to revive the will.[47] And this intention must appear by the codicil itself, and not by any extrinsic act, as by affixing it to the earlier revoked will.[48]

27. Extrinsic evidence cannot be received, to show that the destruction of a later will was intended to revive a former one,[49] nor

[44] Rowley *v.* Merlin, 6 Jur. N. S. 1165 (1860).

[45] Birch *v.* Birch, 6 Notes Cas. 581; 1 Jarman, 135 and note. In the last case, some of the blanks were filled in with red ink, and others with black ink, and it was held, that the filling, in red ink, was done after the execution, the envelope appearing to have been broken, and resealed.

[46] Re Cunningham, 1 Searle & S. 132; 1 Jarman, 135 and notes; ante, § 19, pl. 17.

[47] 1 Jarman, 136.

[48] Marsh *v.* Marsh, 6 Jur. N. S. 380.

[49] Major *v.* Williams, 3 Curteis, 432; 1 Jarman, 136.

to show that a codicil, setting up a former will, was intended to refer to a different will.[50]

28. And as both the statute of frauds, and the late English statute, require that the act of revocation should be done by the testator, or in his presence, and by his express direction, it is not competent for him to delegate such an authority to another, to be executed elsewhere, or after his death.[51]

29. And where those interested in the estate suppress the will, in order to avoid the payment of the legacies, and proceed to settle the estate, as if it were intestate, a court of equity will set up such legacies as were contained in the will, even without formal probate of the will in the Court of Probate.[52]

30. The American cases are very numerous, where it has been held, that any act defacing an existing will, done by the testator, derives its character solely from the intent with which it is done.[53] It seems to be necessary, according to the great majority of the American cases, that the act of revocation required * by the statute, should be performed by the testator, to some extent, in order to constitute a valid revocation.[54]

31. It seems to have been held in some of the American cases, contrary to the rule of the English courts, already stated, that the mere intention to revoke [illegible]'s will, shall have the effect of revocation, where the testator is deceived into the belief that he has

[50] Walpole *v.* Cholmondely, 7 Term Rep. 138; Re Chapman, 1 Rob. 1.

[51] Stockwell *v.* Ritherdon, 12 Jur. 779; Re North, 6 Jur. 564.

[52] Mead *v.* The Heirs of Langdon, cited in Adams *v.* Adams, 22 Vt. 50.

[53] Boudinot *v.* Bradford, 2 Yeates, 170; Brown's Will, 1 B. Mon. 57; Dan *v.* Brown, 4 Cowen, 490; Means *v.* Moore, 3 McCord, 282; Jackson *v.* Holloway, 7 Johns. 394.

[54] Dan *v.* Brown, 4 Cowen, 490. *Woodworth*, J., here said: "The act of cancelling is, in itself, equivocal, and will be governed by the intent. There must be a cancelling, animo revocandi. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of these are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation."

"If the slightest burning or the slightest tearing be accompanied with satisfactory evidence, drawn aliunde, of the intention to revoke, the statute will be satisfied, and the instrument revoked." Johnson *v.* Brailsford, 2 Nott & McCord, 272. Where the word "destroying" is used in the statute, as one mode of revocation, it is generally held to include all modes of defacing not specifically enumerated in the statute, and does not require an absolute and entire destruction. See Johnson *v.* Brailsford, supra, and ante, pl. 5 et seq.

destroyed his will; as where he asked for his will, on his sick bed, and was handed an old letter, which he destroyed, supposing it to be his will.[55] So also, where the testator threw his will upon the fire, animo revocandi, and it was taken off and preserved, before any words were burned, and without the testator's knowledge, it was decided, by a very able court, that it did amount to revocation.[56] In a very recent case,[57] it was decided, by the Supreme Court of Vermont, where the testator, two years after the execution of his will, wrote upon the same piece of paper, below the signature of himself and the witnesses, and so as not to come upon any portion of the writing of the instrument, except that which was upon the opposite side of the paper, the following words, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," that it amounted to a sufficient revocation, by "cancelling," under a statute substantially the same as the English statute of frauds, and requiring an express revocation in writing to be signed by the testator in the presence of three witnesses.

This case has certainly carried the rule of law further in that direction than any one which has preceded it; and further, it seems to us, than can fairly be maintained in consistency with established principle. It has always hitherto been required, in order to an effectual revocation by "burning, tearing, cancelling, or obliterating," that both the act required by the statute, and the intent to revoke, should concur. And it has never before been claimed that these terms could any of them receive any other construction, except that which they bear in their natural and primary sense. In that sense, it could scarcely be claimed that a written instrument could be said to be cancelled, in every respect, or to any extent, unless some portion of the written words were de-

[55] Pryor *v.* Coggin, 17 Ga. 444.

[56] White *v.* Casten, 1 Jones, Law, 197. So where the testatrix burns a paper, which she supposes to be her will, but by mistake, or the fraud of others, burns a different paper, and remains under this misapprehension during her life, it amounts, in law, to a revocation. Smiley *v.* Gambill, 2 Head, 164. But telling the sole devisee, who has the will, to destroy it, and refusing to remain satisfied until assured by such devisee, that the will is destroyed, does not amount to a revocation. Runkle *v.* Gates, 11 Ind. 95. And in a recent case in Vermont, it was held, that the mere intention, or desire, to revoke one's will, until carried into effect, in the manner prescribed in the statute, can have no effect. But if such intention is defeated by fraud, a court of equity will prevent the party moving, from any benefit of such fraud. Blanchard *v.* Blanchard, 32 Vt. 62.

[57] Warner *v.* Warner's Estate, 37 Vt. R.

faced. It seems to have been assumed in this case, that here was no "burning" or "tearing," and no "obliterating;" but it was claimed that the writing did cancel, or annul, the will. But this is using the term altogether in a secondary or metaphorical sense, and in a sense in which every will is placed, after revocation. So that, in this sense, any writing which operated to revoke the will must amount to cancelling it. We thus render wholly inoperative the provision requiring express revocations to be formally executed by the testator, or else treat it as having reference only to one particular mode of cancelling.

The case seems to us nothing more than an informal execution of what was intended to be an express revocation in writing. It does not seem to be a "cancelling" of, or attempt to cancel, the instrument in any respect. "Cancelling" seems to be only one mode of "obliterating;" and so the most approved lexicographers define it.[58] "Burning" and "tearing" may be said to apply to the paper; and hence that act must be literally performed upon the paper itself, and not upon the envelope merely, which might be regarded as only figurative "burning." [59]

But "cancelling" and "obliterating," by the mere force of language, do naturally, and almost necessarily, refer to the writing. It could not be said that a will was cancelled in the slightest degree, because crosses and scratches were made upon its blank spaces and margins. To effect this there must be some erasure of some portion of the writing itself: unless we adopt this restricted construction, we depart wholly from all the analogies which have been established in the construction of the other terms in the same clause of the section, and having reference to similar modes of revocation; and we also extend this one mode so as to include all the other modes of revocation.

It seems to us that it cannot fairly be argued in regard to this case, or to others analogous, that there is any act of cancelling, whereby the will is annulled. It is the meaning and force of the words used by the testator which annuls the will, and renders it thereafter of no equitable force, and not because the testator had cancelled any portion of the will, with intent to revoke the

[58] Webster, — "To cross the lines of a writing, and deface them, to blot out or obliterate them." Worcester, — "To cross and deface as a writing, to blot out, to expunge, to efface, to erase."

[59] 2 Ante pl. 6, n. 6.

whole. If the words attempted to be written had been wholly illegible, or if the same extent of defacing the paper had occurred, without attempting to write words, no one would claim that the will was cancelled, or in any way affected. It is, then, the force and meaning of the words which constitute the cancelling, or annulling, of the will. It is a revocation by the mere force of the written words, and comes clearly within the express requirements of the statute as to formal execution before witnesses.

* 32. And we could not regard either of the cases[55 56] as sound to the full extent, so far as they depend for effectual revocation upon the fraud of others, unless it were possibly that of White *v.* Carter. Such a fraud, practised by parties interested under the will, should certainly defeat their interest, and entitle the heir, or next of kin, to a perpetual injunction in a court of equity against all claim on their part, on the ground of fraud, or by decreeing the fraudulent legatees to stand as trustees for the parties otherwise entitled. But the law is clearly not so.[60]

33. But the English rule that a valid will, once existing, must continue in force, unless revoked in the mode prescribed, is very generally adopted in the American courts.[61] In a recent case in Pennsylvania,[62] this question was very carefully examined, and the rule of the English courts affirmed. *Knox*, J., said, "To comply with the statutory requisition of revocation by destroying, there must be some act of destruction, or towards destruction, done, animo revocandi — mere words will not suffice. It is also here held, that the act, to constitute revocation, must be * by the express direc-

[60] Allen *v.* Macpherson, 5 Beav. 469; s. c. on appeal, 1 Phill. 133, where the bill was dismissed, on a full review of the authorities, on the ground of want of jurisdiction. 1 Story, Eq. Jur. § 184, and cases in note. And in the American courts, any question of fraud going to the whole will must be taken before the court having jurisdiction of the probate. Gaines *v.* Chew, 2 How. U. S. 619, 645; 1 Story, Eq. Jur. supra.

[61] Gains *v.* Gains, 2 A. K. Marshall, 190. It is here said, in regard to revocation: "We cannot, under any circumstances, substitute the intention to do the act, for the act itself." Independent of the existence of the statute of frauds, or any statute requiring any specific formalities in the revocation of wills, and while they might have been revoked by parol, it would seem, that any act, by which the testator supposes he has destroyed his will, although he is fraudulently deceived into that belief contrary to the fact, may be held a sufficient revocation. Card *v.* Grinman, 5 Conn. 164.

[62] Clingan *v.* Mitcheltree, 31 Penn. St. 25. See also, Smith *v.* Fenner, 1 Gallison, C. C. 170.

tion of the testator, and in his presence, and that his subsequent ratification would not be equivalent.

34. In an important case in North Carolina,[63] this general question is very thoroughly examined by an experienced judge, whose language is worthy of being carefully pondered. *Ruffin*, Ch. J., said: "The statute does not define what is such a cancellation or obliteration, as shall amount, conclusively, to a revocation of a will. Burning, or the utter destruction of the instrument by any other means, are clear indications of purpose which cannot be mistaken. But obliterating may be accidental, or may be partial, and, therefore, is an equivocal act, in reference to the whole instrument, and particularly to the parts that are unobliterated. So cancelling, by merely drawing lines through the signature, leaving it legible, and leaving the body of the instrument entire, is yet more equivocal, especially, if the instrument be preserved by the party, and placed in his depository, as a valuable paper. It may be admitted, that the slightest act of cancellation, with intent to revoke absolutely, although such intent continue but for an instant, is a total and perpetual revocation, and the paper can only be set up as a new will. But that is founded upon the intent. Without such intention, no such effect can follow; for the purpose of the mind gives the character to the act. When, therefore, there appears what may be called a cancellation, it becomes necessary to look at the extent of it, at all the conduct of the testator, at what he proposed doing at the time, and what he did afterwards to satisfy the mind, whether that was in fact meant as a cancelling, and was to operate as a revocation, immediately and absolutely, or only conditionally, upon the contemplation of something else then in view. For, although every act of cancelling imports * prima facie that it is done animo revocandi, yet it is but a presumption which may be repelled by accompanying circumstances."

35. The American cases confirm the English rule, that the time of revocation, to be effectual, must be in the present tense.[64] In the case of Brown *v.* Thorndike, the testator wrote on his will, and immediately under the attestation: "It is my intention, at some

* [63] Bethell *v.* Moore, 2 Dev. & Batt. 316. The act here done by the testator, was to draw a pen several times across different letters in his signature, in the usual mode of erasing writing, thus: ~~William~~ ~~Bethell~~. See also, Boudinot *v.* Bradford, 2 Dall. 266.

* [64] Brown *v.* Thorndike, 15 Pick. 388; Sumner *v.* Sumner, 7 Har. & J. 388; Ray *v.* Walton, 2 A. K. Marshall, 71; Gaines *v.* Gaines, id. 190.

future time, to alter the tenor of the above will, or rather to make another will; therefore be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect," and it was held to amount to a present revocation, and not a mere declaration of intention to revoke by some future act, and that it was effectual, as a revocation of personal estate, the statute requiring no formalities for that purpose.

36. It seems to have been regarded as an unsettled question in the English courts, both in Westminster Hall, and Doctors' Commons, whether the cancellation of a later revoking will, would have the effect to revive the former will thus revoked.[65] *The result of

[65] 1 Wms. Exrs. 154, 155, and cases cited. The cases are not reconcilable. Even Lord *Mansfield's* intimations, in different cases, are scarcely reconcilable with each other, as in Burtenshaw *v.* Gilbert, Cowp. 53, where the cancelling of a later revoking will is held not to revive the will revoked; and in Harwood *v.* Goodright, Cowp. 92, his lordship says expressly: "If a testator makes one will and does not destroy it, though he makes another, at any time, virtually, or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good."

This latter opinion of so eminent a judge, and the analogy drawn from the repeal of a repealing statute, has given a very general impression, even among the profession, that the cancellation, or revocation, of a revoking will, does have the effect to set up the will before revoked. Even so distinguished a writer as Chancellor *Kent*, 4 Comm. 531, uses language very similar to that quoted from Lord *Mansfield*: "If the first will be not actually cancelled, or destroyed, or expressly revoked on making a second, and the second will be afterwards *cancelled, the first will is said to be revived." But he adds, in a note, "such an effect will depend on circumstances." Ante, § 25, pl. 12, n, 20.

It seems agreed on all hands, that if the first will be actually cancelled, or destroyed, upon the execution of the second, or later one, it cannot be treated as impliedly revived, by the cancellation of the later one, but that it requires a republication to produce that effect. Burtenshaw *v.* Gilbert, supra; Semmes *v.* Semmes, 7 Harr. & Johns. 388; Major *v.* Williams, 3 Curteis, 432. And where the testator made erasures and interlineations in the latest of two wills, having preserved both, and gave the later will to his solicitor, to enable him to prepare another, according to the corrected draught, and declared at the time, that he had done away with that will, and at the same time expressed a desire, that if the new will should not be executed, the one of earlier date should go into effect, it was held, that the later will was thereby revoked, but that this did not amount to a republication of the earlier will. Bohanon *v.* Walcot, 1 How. (Miss.), 336. Mr Justice *Smith*, likened the case to that of Johnson *v.* Brailsford, 2 Nott & McCord, 272, where the seals were partly torn off the will and codicil, after having been crossed with a pencil, and several interlineations made in the body of the will, and concludes by quoting the language of Judge *Huger*, in the case last referred to, "that in this case, the jury have found that the will was torn, animo revocandi.

the most careful examination of the cases, leaves the subject in a state of distressing uncertainty. The most we can say is, that it depends upon circumstances; and that * extrinsic evidence is admissible, in regard to the intention of the testator, was freely admitted, before the late statute, which required some positive act of revival.[66]

37. The soundness of the mind and memory is as requisite to the valid revocation of a will, as to its execution. It follows, of course, that the performance of the mere factum of tearing, cancelling, obliterating, burning, &c., without the animo revocandi, which the statute makes indispensable to the revocation, and which could not exist, unless the testator were in his sane mind, could have no legal operation upon the instrument.[67]

38. As part of a will may be established and part rejected, upon the ground of the testator's incapacity at the time of the execution of the latter;[68] or a will may be established and the codicil rejected, on the ground of mental unsoundness in the testator, at the time of its execution;[69] so it must follow, as an obvious consequence of what has been said, that a portion of the will which has

It cannot be important what part of the will be torn; the seal, though unnecessary to the will, was made a part of it by the testator; the first two or three lines are equally unnecessary, and yet it would not be contested, if these were torn from the instrument, with intent to revoke, the statute would be satisfied."

If one allows a duly executed will to survive him, it will not be revoked by a subsequent one, which was cancelled before his death, nor by the draught of a will, non animo testandi. Taylor *v.* Taylor, 2 Nott & McCord, 482. In Lively *v.* Harwell, 29 Ga. 509, it is intimated, that the cancellation of a later will is not equivalent to the republication of a former one. And in Bates *v.* Holman, 3 Hen. & Munf. 502, it was held, that where a second will contained an express clause of revocation in the postscript, and was subsequently cancelled by cutting out the testator's name from the body of the will, leaving it subscribed in the postscript, that this did not so far cancel the clause of revocation, as to set up the first will. The execution of a third will is a revocation of two former ones, and this effect continues, even if the last will be lost. It may be proved by parol. Legare *v.* Ashe, 1 Bay, 464.

[*] [66] Ante, pl. 26.

[67] Scruby *v.* Fordham, 1 Add. 74; In the Goods of Brand, 3 Hagg. 754. The same rule obtains in the American courts. Idley *v.* Bowen, 11 Wend. 227; s. c. 1 Edwards, 148; Smith *v.* Wait, 4 Barb. 28. Nelson *v.* M'Giffert, 3 Barb. Ch. 158; Rhodes *v.* Vinton, 9 Gill, 169; Ford *v.* Ford, 7 Humph. 92. A will or codicil executed under undue influence will not revoke a former will. O'Neall *v.* Farr, 1 Rich. 80.

[68] Billinghurst *v.* Vickers, 1 Phillim. 187; Wood *v.* Wood, id. 357; Trimlestown *v.* D'Alton, 1 Dow. & Cl. 85.

[69] Brouncker *v.* Brouncker, 2 Phillim. 57.

been formally revoked, must, nevertheless, be treated as a subsisting portion of the instrument, in consequence of the sane mind of the testator not having concurred in the formal act of revocation.

39. The effect of mere erasures or interlineations in a will, required to be executed before witnesses, without any formal republication to give them effect, is sufficiently obvious upon principle, perhaps, and has been already explained to some extent, but it has often been made the subject of judicial * decision. By the late English statute,[70] such erasures and alterations are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and the attestation of the witnesses. But the mere circumstance that the name of a legatee, or the amount of a legacy, is inserted in a different ink, or in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption therefrom arise against a will being duly executed, as it appears. The case is different, where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such a case, the onus probandi lies upon the party who alleges such alteration to have been made prior to the execution, to prove by extrinsic evidence, that the words were inserted before execution, and that they had the sanction of the testator.[71]

* [70] 1 Vict. ch. 26, § 1.

[71] Greville *v.* Tylee, 7 Moore, P. C. C. 320; s. c. 24 Eng. L. & Eq. 531. It was here held, that in the absence of proof, that certain words in a will, written with a different pen, and in a different ink, and in a different handwriting, partly upon an erasure, were inserted prior to the execution, so much of said will, consisting of the inserted words, containing a residuary disposition, must be pronounced against. See also, Cooper *v.* Bockett, 4 Moore, P. C. C. 419; Simons *v.* Rudall, and other cases cited ante, n. 43.

Where the testator, two years after the execution of his will, made an interlineation in it, in the margin of which, and opposite the interlineation, he and the subscribing witnesses placed their initials, it was held, that the interlineation was to form part of the probate. In the Goods of William Hinds, 16 Jur. 1161; 24 Eng. L. & Eq. 608; The Goods of Christian, 2 Robert. 110.

And where the testator, some time after the execution of the will, ordered the names of two executors erased, and two others inserted in their place, it was held, that in the probate, the names erased must be restored. Parr in re, 6 Jur. N. S. 56.

There is no presumption that alterations on the face of a will were made at any particular time, but those who propound the will must make the doubt clear. Williams *v.* Ashton, 1 Johns. & H. 115. And, although the testarix told the witnesses to her will that she had made alterations in her will, but did not allow them to see what they were, it was held, that in the absence of testimony, showing

*40. And by the decisions in the American states, and the English courts before the present statute, as before stated, it would seem that alterations, by way of additions, made in a will by the testator, and not duly authenticated, do not avoid it, * and are of no avail, but leave it just as it was before, so far as it is practicable to ascertain what the former words were.[72]

41. And it has been held, that where the testator inserted an additional bequest in his will a few days after its execution, and in the presence of the original witnesses, of which he requested them to take notice, that it neither revoked the will, nor in any way invalidated it, and that the additional bequest became a part of

what alterations were made before execution, they could not give effect to any of them. Id. And where the will, at the time of execution, contained many marginal notes and alterations, in the handwriting of the solicitor, and about four years afterwards a codicil was executed, in which no reference was made to the contents of the will, and the papers remained in the hands of the testatrix, until the time of her decease, when it was found that the marginal note, disposing of the residue of her personalty, and several other bequests, had been struck through with a pen, and other alterations had been made in the handwriting of the testatrix: It was held, that in the absence of affirmative evidence, that such alterations were made before execution, whether that be taken, as of the date of the will or codicil, it must be presumed they were made subsequently, and could not, therefore, be included in the probate. Rowley *v.* Merlin, 6 Jur. N. S. 1165.

We have before adverted to the case of Cunningham in re, ante, pl. 25, where several alterations having been made in a will, the original witnesses and the testator traced their original signatures with a dry pen, and the witnesses wrote their initials in the margin opposite each alteration, it was held, that their initials were no evidence of a due execution of the alterations, and the court refused to admit them to probate.

Where the will was written upon the first and third pages of several sheets of note paper, stitched together in the form of a book, and at the foot of one of the pages were these words: "I leave the whole of my property to the following religious societies + to be divided in equal shares among them;" and at the top of the opposite page, which was otherwise blank, were the names of certain societies, and the surviving attesting witness could not state that the names were there at the time of execution: it was held, that they must, therefore, be regarded as interlineations, and in the absence of proof of being inserted before execution, could not be admitted to probate. White in re, 6 Jur. N. S. 808.

And where the will, on presentation for probate, showed one of the legacies erased, but so as to be legible, and the testimony was conflicting upon the point whether it was done before or after the execution of the instrument, the court, being of opinion it was done afterwards, granted probate without the erasure. Hardy in re, 30 Law J. Prob. 142.

* [72] Jackson *v.* Holloway, 7 Johns. 394; Wheeler *v.* Bent, 7 Pick. 61; Locke *v.* Jones, 11 M. & W. 901.

the will.[73] But it may be questionable how far this case is entirely reliable as a ground of action in future cases. The thing being done in this mode, and the alternative being presented of either supporting it, or nullifying the act, might sometimes induce courts to maintain it, under such circumstances; so that we could not regard the case as a safe precedent to be followed, in other cases.

42. It is obvious, that where olograph wills are allowed, or where testaments affecting personal estate are recognized in every form, as in England before the late statute, that alterations made by the testator in such a will become ipso facto a portion of the instrument. So that the presumption of their being made after the making of the instrument, will not affect their validity.[74]

43. It seems to have been sometimes supposed, that the same rule will apply to alterations in a will, after its execution, and without the concurrence of the testator, which apply to other instruments which have already become operative; and that, if such alterations be made by one, interested under the will, that * it will have the effect to avoid the whole instrument.[75] But the point is here left open in regard to alterations by a stranger. We think that material alterations, by the party in interest, may well be regarded as avoiding his rights, by way of estoppel en pais; but whether it could have any effect to avoid the instrument, as to other parties, is more questionable. It would seem it could not have any such effect.[76] And it has been held, that an immaterial alteration, by a stranger, will have no effect upon the instrument,[77] and the probate will restore the altered portion.

44. There seems to be no question, that under the statute of frauds, and other similar statutes, upon principle, parts of an entire will may be revoked by obliterating, in the same mode the whole

[73] Wright *v.* Wright, 5. Ind. 388.

[74] Cogbill *v.* Cogbill, 2 Hen. & Munf. 467. But an olograph will cannot be revoked in Tennessee, without some act done, clearly indicating such intention, such as cancellation, destruction, removal from the place of deposit, or reclamation from the person with whom it had been lodged. Marr *v.* Marr, 2 Head, 303. The testator cannot work the revocation of such a will by declarations merely. Ib.

[75] *Platt*, J., in Jackson *v.* Malin, 15 Johns. 297, 298.

[76] Wood *v.* Wood, 1 Phillim. 357.

[77] Malin *v.* Malin, 1 Wend. 625.

may be so revoked, and Mr. Jarman so lays down the rule.[78] The same rule has been adopted in this country, to some extent.[79] But the authorities are not clear upon the point. But, as already intimated, where such partial revocations are dependent upon a condition; as where the testator makes obliterations only with a view to substitute other provisions in lieu of those erased, and where it is obvious, that the making of the one depended upon the supposed validity of the other, in the mind of the testator, and that the erasures would not have been made, except upon the condition that the substituted portions could, and would, become operative, it has been uniformly held, that where the alterations, or additions, have not been so executed as to become valid portions of the instrument, the erasures cannot be treated as effective revocations of those portions even.[80]

* 45. It is not important that a revoking will should make any disposition of the property bequeathed in the former will.[81] It has been held in some of the American courts,[82] that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, proprio vigore, and instantaneously, as a revocation, and consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility, from the fact, that an instrument of revocation alone would unquestionably have this effect.

[78] Ante, pl. 21, 22; 1 Jarman, Eng. ed. (1861), 125; Burkitt *v.* Burkitt, 2 Vern. 498. See also, Sutton *v.* Sutton, 2 Cowp. 451. And alterations by direction of testator, do not avoid the will. Wheeler *v.* Bent, 7 Pick. 61.

[79] Brown's Will, 1 B. Mon. 57; McPherson *v.* Clark, 3 Bradf. Sur. Rep. 92.

[80] Ante, pl. 22, and note; Jackson *v.* Holloway, 7 Johns. 394; McPherson *v.* Clark, 3 Bradf. Sur. Rep. 92. Mr. Bradford, the learned surrogate, in the very conclusive opinion in this case, refers to the following authorities not all before named by us: Onions *v.* Tyrer, 1 P. Wms. 343; Kirke *v.* Kirke, 4 Russ. 435; Martins *v.* Gardiner, 8 Sim. 73; Mence *v.* Mence, 18 Vesey, 350; 9 Cow. 208; 2 Johns. 31; 2 W. & S. 455; 4 S. & R. 295.

[81] The matter of Thompson, 11 Paige, 453.

[82] James *v.* Marvin, 3 Conn. 576. See Boudinot *v.* Bradford, 2 Dall. Penn. 266. An instrument purporting to be a will, with a revocatory clause, cannot be given in evidence as a revocation only, unless it has been admitted to probate. Langton *v.* Atkins, 1 Pick. 535, 543. And in the same case it was held, that where the instrument failed, from some imperfection in its structure, or for want of due execution, it could not operate to revoke a former will, because it cannot be known that the testator intended to make his will, except for the purpose of substituting the other.

But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will, with a revocatory clause, is very different. It is but substituting one will for another. And the revocatory clause is made dependent, in some sense, upon the subsequent will going into operation. And there is, ordinarily, no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is, therefore, ambulatory, and when destroyed, it all ceases to have any operation.

46. Where a testator executed a second will, supposing that his former will was lost, but afterwards found that, and then destroyed the later one, saying that he preferred the first, it was * held entitled to probate.[83] In Connecticut,[84] under the early statute, there was no express provision in regard to the mode of revoking wills, and the courts held, that even wills of real estate might be revoked by parol,[84] and that where the devisees in a will, after the testator had revoked it, fraudulently took it out of his possession and preserved it, while they induced him to believe it had been destroyed, it could not be admitted to probate.

47. In North Carolina it was held, that the revocation of a will was an act of the mind, demonstrated by some outward and visible sign.[85] And so long as the act is imperfect, or merely inchoate, the revocation does not become effectual.[86]

48. It is a principle of universal acceptance in both the English[87] and American courts, that where a will is once known to exist, and was last heard of in the custody of the testator, and cannot be found after his decease, it raises a legal presumption that it was destroyed by the testator, animo revocandi.[88] And it is suggested

[83] Marsh *v.* Marsh, 3 Jones, Law, 77.

[84] Card *v.* Grinman, 5 Conn. 164; Witter *v.* Mott, 2 Conn. 67. See also, Lawson *v.* Morrison, 2 Dall. 289. But in most of the states, a devise of real estate is not revocable by parol. Jackson *v.* Kniffen, 2 Johns. 31; Boudinot *v.* Bradford, 2 Yeates, 170. In Smith *v.* Dolby, 4 Harring. 350, it was held, that a will can be revoked only by substitution, or by cancelling, except in cases of implied revocation.

[86] White *v.* Casten, 1 Jones, Law, 197.

[86] Means *v.* Moore, Harp. 314; Leacraft *v.* Simmons, 3 Bradf. Sur. Rep. 35.

[87] Ante, pl. 8.

[88] Holland *v.* Ferris, 2 Bradf. Sur. Rep. 334. If the testator execute his will, and it be shown that before his death it was gone from the trunk, where it was usually kept by the testator, but it appearing that this was not by the act of the

by an experienced magistrate,[89] that where a will * is known to have been made, which the testator afterwards declares has been destroyed, to search for the same among the papers of the testator, notwithstanding the legal presumption of its destruction by the testator.[89]

49. Although where the acts of obliteration are sufficient in themselves to amount to a revocation pro tanto, if done with that intent, they will not have that effect if done as part of an entire transaction, the effect of which was to make a different disposition of a portion of the estate, and the entire transaction was left imperfect and incomplete;[90] yet where the testator destroyed his will, believing it had already been revoked by a later will, which proved to be invalid, and there was no other evidence of his intent except his declaration made at the time, that it was no use to keep it, as he had another, it was held the will was not revoked.[91]

testator, it was held, that the will might be admitted to probate, notwithstanding the prima facie presumption of its revocation. Minkler *v.* Minkler, 14 Vt. 128; s. p. Jackson *v.* Brown, 6 Wend. 173, reversing s. c. 9 Cow. 208.

[89] Bulkley *v.* Redmond, 2 Bradf. Sur. Rep. 281. But where the will is deposited for safe-keeping in the hands of the scrivener, and cannot be found after the testator's death, and the depositary is ignorant of the mode of its abstraction or disappearance, the presumption is in favor of the will remaining in force until the time of testator's decease. Hildreth *v.* Shillenger, 2 Stark. 196.

[90] Ante, pl. 44; McPherson *v.* Clark, 3 Bradf. Sur. Rep. 92; Hairston *v.* Hairston, 30 Miss. 276. But where the testator, not long before his death, procured a draft of a will for perusal and execution, but which was found at his death unexecuted, and his former will, which he spoke of, not long before his death, as still a subsisting will, was not found, it was held, that a sufficient presumption arose that he had destroyed it, animo revocandi. Mitcheson in re, 9 Jur. N. S. 360. See also Dickinson *v.* Swatman, 6 Jur. N. S. 831; Appelbee in re, 1 Hagg. 144. And in the very latest English cases, it is said that the doctrine of dependent relative revocation only applies where the revocation is to be dependent upon some future event, and not to past transactions, as the burning of a later will, with the purpose of thereby reviving an earlier one. Dickinson *v.* Swatman, 6 Jur. N. S. 831. In the very late case of Middleton in re, 3 Sw. & Tr. 583, s. c. 10 Jur. N. S. 1109, the testatrix duly executed her will in 1855, and in 1862 she signed another will, being a copy of the former one, with certain exceptions, but which was not duly attested. In 1864, she cut out the names of the attesting witnesses to the earlier will, in the presence of a fellow servant. Both documents were retained in her possession until her death. The court held that the doctrine of dependent relative revocation applied, and that the will of 1855 was entitled to probate.

[91] Clarkson *v.* Clarkson, 2 Swab. & Trist. 497. We have stated post pt. 2, § 4, n. 2, the practice of the English courts in regard to granting probate of the will in fac simile, as to any alterations appearing upon the face of the will at the time

50. The question of the express revocation of wills is elaborately considered by the Supreme Court of New Jersey, in a very recent case,[92] and the following principles declared: 1. That where two wills of the testator are found after his decease, if the one of later date is not duly executed, that will not affect * the one of earlier date, but it will remain the last will and testament of the testator, unless annulled in some other mode. 2. That a will can only be revoked in the manner provided by statute, and cannot be annulled, or changed, by any verbal declaration of the testator made after its execution.

51. Some of the later English cases may be here noticed. Where the will, executed two years before the death of the testator, was found in a box torn in several pieces, and the woman, who cohabited with the testator some years before his decease, in December, 1860, testified, that in August of that year, at his request, she took the will from the box, and gave it to him, and that he then tore it

of execution, or so made as to become valid portions of the instrument; or where their effect depends upon construction. In the very recent case of Smith in re, 3 Sw. & Tr. 589, s. c. 10 Jur. N. S. 1243, where a will had been executed, on the face of it, in 1858, and subscribed by two legatees named in it, as witnesses, and was re-executed in 1860, and attested by different witnesses; and after the death of the testatrix was found with the first attestation clause and the names of the witnesses cancelled; but there was no evidence to show the date of the cancellation, — the court refused to exclude the part cancelled from probate, and directed the probate to go in fac simile. And in another very recent case, Raine in re, 11 Jur. N. S. 587, the deceased executed his will and codicil thereto in the presence of three witnesses, two of whom subscribed their names as such to both instruments. Immediately afterwards, before any person had left the room, the deceased having been informed that one of the witnesses would forfeit her interest under the will, ordered her name to be struck through, and the third witness to sign the will and codicil, which was done; and it was held the court could not allow the probate with the omission of the name struck through, but that it must go in fac simile. The language of the learned judge on this occasion expresses very clearly the reason for this form of probate, and will suggest important grounds for adopting the same form in the American practice. "Sir *J. P. Wilde* had no doubt that the deceased executed his will and codicil in the presence of two witnesses, who attested the same in his presence, but it was his duty to order the probate to issue in fac simile. The court of chancery could then say whether Elizabeth Marshall had forfeited her legacy. . . . It is for a court of construction, not for the court of probate, to determine what is the effect of her having signed these papers. If the probate issues with the name upon it, as it appears on the original will, the court of construction can give an opinion in the matter, which it cannot do if the name be omitted."

[92] Boylan *v.* Meeker, 4 Dutcher, 274.

in pieces, and returned it to her, and directed her to put the pieces in the fire, and her testimony was confirmed by that of her brother-in-law, who claimed to have been present, it was nevertheless held, that from the innate improbability of the story, and other testimony, from letters written by the deceased, a counter presumption arose, that the tearing was not done by him, or with his knowledge, and that, therefore, there was no revocation.[93]

52. The declarations of the testator to the fact of revocation are not admissible, except made at the time, as part of the transaction, and in connection with, and as explanatory of, the purpose of his acts.[94] But such declarations were held admissible in a recent case, to rebut the presumption of revocation from the will not being found at the decease of the testator.[95]

53. A will is not revoked by mere abandonment; some unequivocal act of cancellation or obliteration is requisite for that effect. And that act must be done by the testator, or by some one in his presence and by his direction.[96] But where the will * is found mutilated after the decease of the testator, and had last been in his custody, the prima facie presumption is, that it was done by the testator, animo revocandi.[97]

54. The same rule applies, as to the presumptive date of mutilations, as to alterations, of a will. So that if no evidence can be given, as to the time when they were made, it will be presumed they were made after the execution of the document in which they appear, and if there is a subsequent testamentary paper to that, after the execution of that paper.[98]

* [93] Staines *v.* Stewart, 8 Jur. N. S. 440.

[94] Staines *v.* Stewart, supra; Doe d. *v.* Palmer, 16 Q. B. 747; opinion of Lord *Campbell* in same, p. 757: "Declarations of the testator, after the time when a controverted will is supposed to have been executed, would not be admissible to prove that it had been duly signed and attested, as the law requires, and for the same reason, a declaration by the testator, after the will was executed, that the alterations had been made previously, would be inadmissible." S. C. 6 Eng. L. & Eq. 155.

[95] Whiteley *v.* King, 17, C. B. N. S. 756; S. C. 10 Jur. N. S. 1079; Youndt *v.* Youndt, 3 Grant, cas. 140.

[96] Andrew *v.* Motley, 12 C. B. N. S. 514.

* [97] Evans *v.* Dallow, 31 Law J. Prob. 128. The mutilation here was tearing off the names of the witnesses.

[98] Christmas *v.* Whinyates, 9 Jur. N. S. 283.

SECTION III.

BY ALTERATION OF ESTATE.

1. Change in the title of real estate amounts to revocation, at common law, and under the statute of frauds.
2. But the learning of the English law not applicable under the present English statute.
3. The substance of the present English statute adopted in most of the American states.
4. Before that statute any change in title, resulting from new contract of testator, is revocation.
5. This rule applied to partition of estate.
6. To estate contracted for, but not conveyed.
7. Partial alienations only produce revocation pro tanto. Total alienation defeat the devise.
8. But this effect is not produced by sale under decree to raise incumbrance.
9. Where the transfer is made under compulsory powers.
10. Any essential change in the property will defeat a specific devise.
11. A mortgage security is not the same after the foreclosure of the mortgage.
12. The proper limits of the rule discussed.
13. Conveyance of the estate devised, or a portion of it, in America, a revocation pro tanto.
14. Sale of the estate and taking mortgage for price, revocation pro tanto.
* 15. Such a contract to convey, as equity will enforce, is a revocation.
16. The conveyance of so large a portion, as to break up the scheme of the will, a revocation.
17. Grant in fee reserving rent, or conveyance to devisee, is a revocation.
18. Conveyance in trust during life, or for payment of debts, no revocation.
19. A deed conveying land to uses, declared in an existing will, is irrevocable.
20. A conveyance in trust for the same uses declared under the will, no revocation.

§ 26. 1. THE will only operated upon such real estate as the testator possessed at the time of making it, at common law and under the earlier English statutes.[1] And not only newly-acquired estates, but where the form of the interest had been materially changed, after the date of the will, such change in the estate is construed as a revocation of the will. And even where one seized of a lease for lives, devises it, and afterwards renews the lease, it is held a revocation.[2] But it has been held, that the mere fact of a possibility

[1] Jarman, 136.

[2] Marwood *v.* Turner, 3 P. Wms. 163. This was where the testator held an estate tail, and suffered a common recovery to the use of himself in fee, the remainder in fee being before in him, and it was held a revocation of the will.

becoming vested, or a contingent estate becoming absolute, without any agency of the testator, will not amount to a revocation.[3]

2. The English treatises upon the subject of wills contain much nice learning, and many rather unsatisfactory distinctions, in regard to what change in an estate will amount, either to a revocation of the particular devise, or of the will itself, all of which have become inapplicable to cases of wills executed in England since 1837, the date of the present English statute,[4] which provides, that no conveyance of real estate made after the execution of a will, or other act in relation to such estate, shall prevent the operation of the will upon such portion of the estate, as the testator may have power to dispose of at his * death. Since this statute came in force, the old learning upon this subject has become of no avail, even in England, except in regard to wills of a date anterior to the statute, which are now very few, it is presumed.

3. And as most of the American states have similar statutes, or else have adopted the substance of its provisions, by construction, on the ground of their reasonableness and conformity to the probable intentions of testators, we may content ourselves with a very brief and general analysis of the cases upon this question.

4. Before the late statute, the rule in England seems to have been, that any change in the estate, which resulted from mere lapse of time, and the happening of events, without the agency of the testator, would not effect a revocation of the will, either in whole or in part.[5] And even where the change was nothing more than what the form of the title to the estate provided for, as the payment of the money due upon a mortgage, it did not effect a revocation of the devise.[6] And Sir *Edward Sugden*[7] decided, as Chancellor of Ireland, that the same rule applied to leasehold interests, with the right of renewal, where the lessee, after having devised the estate, renewed the lease. His Lordship considered, that a covenant for perpetual renewal, in equity, creates a perpetual interest. This was certainly a most reasonable decision, although opposed to many other cases.[8]

[3] Jackson *v.* Hurlock, 2 Eden, 263.

[4] 1 Vict. ch. 26, § 23.

[5] Ante, n. 3; Plowden *v.* Hyde, 2 Sim. N. S. 171; S. C. reversed, 2 De G., M. & G. 684.

[6] Plowden *v.* Hyde, 2 De G., M. & G. 684.

[7] Poole *v.* Coates, 2 Dr. & War. 493, 1 Con. & L. 531.

[8] 1 Jarman, 147, and cases cited.

5. So also it was held, under the old statute, that partition between tenants in common and coparceners, was no such change in the estate of the devisor, as will defeat the devise.[9]

* 6. So where the testator contracts for an estate, and after going into possession, and part performance of the contract, so as to take the case out of the statute of frauds, in equity, devises the same, and subsequently accepts a conveyance, precisely according to the contract,[10] it will not operate as a revocation. But if the estate conveyed be different, in any essential particulars from that provided for in the contract, it will operate as a revocation of the devise.[11] So also in all cases where the estate is varied, in any essential particular, by the testator, although not done with any expectation of revoking the devise, it will nevertheless have that effect.[12]

7. Partial alienations will, either under the rule of the earlier English law, or of the present statute, and of the rules which commonly prevail in the American courts, produce a revocation pro tanto.[13] And where the estate devised is contracted to be conveyed, and the purchase-money remains due, in whole or in part, the legal estate only remains subject to the operation of the devise, and the amount due on the purchase-money becomes a part of the general personal estate, or is held in trust for the devisee, as real estate not converted.[14] This depends upon circumstances not necessary to be here discussed.

8. But where an estate, subject to a term to raise a sum of money, is sold under a decree for raising the incumbrance, and * an excessive sale is made beyond what was required to raise the amount due, and the surplus remained in court, it was held, that the sur-

[9] Luther *v.* Kidby, 3 P. Wms. 169, n.; Risley *v.* Baltinglass, T. Raym. 240; Barton *v.* Croxall, Taml. 164. See Attorney-General *v.* Vigor, 8 Vesey, 256, 281 Ward *v.* Moore, 4 Mad. 368; Rawlins *v.* Burgis, 2 V. & B. 382; Walton *v.* Walton, 7 Johns. Ch. 267; Ashburner *v.* Macguire, 2 B. C. C. 108; Basan *v.* Brandon, 8 Sim. 171. If in the partition the testator becomes seized of the whole estate in severalty, it will not revoke the devise, but the additional title acquired does not pass under the will. Duffel *v.* Burton, 4 Harr. 290.

[10] 1 Jarman, ed. 1861, 145.

[11] Ward *v.* Moore, 4 Mad. 368; Bullin *v.* Fletcher, 1 Keen, 369; 2 My. & Cr. 432.

[12] Sparrow *v.* Hardcastle, 3 Atk. 798; s. c. Amb. 224; 1 Jarman, 138, 139.

[13] Parker *v.* Lamb, 3 Br. P. Cases, Toml. 12; 1 Jarman, 137, 138; Arnald *v.* Arnald, 1 Br. C. C. 401.

[14] Farrar *v.* Earl of Winterton, 5 Beavan, 1; Moor *v.* Raisbeck, 12 Sim. 123; Ex parte Hawkins, 13 Sim. 569. See Clingan *v.* Mitcheltree, 31 Penn. St. 25.

plus retained the character of real estate, and as such would go to the devisee, the devise remaining unrevoked, notwithstanding the sale and conveyance of the estate.[15] But if the sale is made under a power of sale in another, the will is revoked, unless the sale is made after the death of the testator.[16]

9. Where the transfer is made under compulsory powers granted to railways and other public works, the English cases do not seem to have established any definite rule in regard to whether it shall be regarded as a conversion of the realty into personalty, so as to work a revocation of the devise, or not. It seems to be considered, that it depends upon the phraseology of the statute.[17]

10. As we have already intimated, where there is an essential change in the character of an estate, either real or personal, it will no longer pass under a specific bequest, the terms of the will being no longer applicable to the subject-matter. This will be more extensively considered under the title of Legacies, under the head of ademption.

11. It may be proper to notice here one very common case, where mere personalty, as the estate or interest of the mortgagee, is devised, and the mortgage subsequently foreclosed, and the absolute title of the estate vested in the testator. This seems generally to be regarded as a revocation of the devise.[18] * And in Ballard *v.* Carter, it is said to make no difference in that respect, whether the mortgagee take a release of the equity of redemption, or extinguish it by decree of foreclosure, or otherwise, as by entry under statutory provisions, and foreclosure by lapse of time after such entry, it will be a revocation of the devise. In the very able opinion in this case, by *Parker*, Ch. J., the revocation is placed upon the ground of a

* [15] Jermy *v.* Preston, 13 Sim. 356; Coote *v.* Dealey, 22 Beavan, 196.

[16] Wright *v.* Rose, 2 Sim. & Stu. 323; Bourne *v.* Bourne, 2 Hare, 35; Gale *v.* Gale, 21 Beavan, 349.

[17] Midland Counties Railway *v.* Oswin, 1 Coll. 80; Same *v.* Wescomb, 2 Railw. Cas. 211; Same *v.* Caldcott, id. 394; Ex parte Flamank, 1 Sim. N. S. 261; Re Horner's estate, 5 De G. & Sm. 483; Re Stewart, 1 Sm. & Gif. 32; Re Taylor's Settlement, 9 Hare, 596; Re Walker's Est. 1 Drew, 508; Re Harrop, 3 Drew, 726; Cant's Est. 4 De Gex & Jones, 503; 1 Jarman, 152.

[18] Ballard *v.* Carter, 5 Pick. 112. See Swift *v.* Edson, 5 Conn. 531. And even * where after the foreclosure, the estate is sold to the same party, and a bond and mortgage taken for the same amount, and a writing is found among the testator's papers, saying it is for the same debt, and shall pass under the will, it cannot so pass, the foreclosure having operated to revoke the devise. Beck *v.* M'Gillis, 9 Barb. (S. C.), 35.

change in the estate of the devisor. The language of the learned judge is so applicable to our purpose here, that we shall adopt it. "On this subject of revocation there seems to have been an excessive degree of refinement, in the English books, as well as some contradiction; and so it has been thought by Lord Chief Justice *Eyre*, and Lord *Mansfield*, as appears in the case of Goodtitle *v.* Otway,[19] and the case of Swift *v.* Roberts.[20] Still, one principle runs through all the cases, and is admitted by all the judges, as well those who quarrel with, as those who support the doctrine of revocation to the extent to which it has been carried, and that is, that the devisor must be seized of the same estate, at the time of his death, that he was seized of when he made his will, to make it a good devise. In other words, that any alteration in the estate, after the making of the will, amounts to a revocation. Lord Chief Justice *Eyre* admits this . . . in Goodtitle *v.* Otway; . . . and Lord *Mansfield*, though he considers the doctrine of revocation to have been carried to an inconvenient, if not an absurd, extent, admits the same principle. Doe *v.* Pott.[21] In assenting to this doctrine, we would understand by any alteration of an estate a material alteration; * one which changes the nature and effect of the seizin of the testator. For there are some cases in the books, which we should not incline by anticipation to adopt as law here." The learned judge concludes, that all which is requisite is, that the testator shall, at the time of his death, be seized of substantially the same estate of which he was seized at the time of his making his will.[22] And according to the present English statute, and those of most of the American states, it is only necessary that the will shall be so expressed, in order to operate upon such estate as the testator may have at his decease, and it is not material, even as to real estate, that he should be seized of the same estate at the time of executing the will, since the instrument will operate upon any estate, coming fairly within its terms, in which the testator is seized of a disposable interest at the time of his death.

12. In a later case than Ballard *v.* Carter,[23] the same court reaffirmed the same principle, and we believe the American courts

[19] 1 Bos. & Pul. 576.

[20] 3 Burrow, 1488, 1491.

[21] Doug. 710, 722.

[*22] *Ashurst*, J., in Goodtitle d. *v.* Otway, 7 Term Rep. 419.

[23] Brigham *v.* Winchester, 1 Met. 390.

would never be induced to carry the doctrine of an implied revocation, from a change of the estate of the testator, beyond this safe limit, which seems to be equally recommended by sound reason and obvious intent of the testator, as indicated by the evident probabilities of the case. There may be some reason to say, perhaps, in the majority of cases, that where the testator devises all his personal estate, in a residuary clause, to legatees by name, which would, at the time of the execution of his will, pass securities, included in a mortgage, that after the foreclosure of the mortgage, the testator may naturally be expected to desire to have the estate go in the same direction. But this, it is obvious, cannot be the case, without too great a departure from the natural import of language, after that estate has so essentially changed its character as to be no longer described by the language of the will, which, in general, is regarded as speaking from the time of the death of the testator, * when it comes in force. This subject is very learnedly discussed by *Aikens*, J., in an early case,[24] and the following conclusions reached; that an alteration in the circumstances of the devisor will not, in any case, amount to a revocation in law. If a part of the estate devised be conveyed by the testator, it will amount to a revocation pro tanto only, and if the devisor convey the whole estate, it is a revocation of the devise ex necessitate; and no revocation is allowable by way of implication, except from necessity. We think such reasonable doctrines will meet with no resistance in this country.

13. It seems well settled, by the other American cases, that the revocation of a will pro tanto is effected, and that only, by a conveyance of a portion of the real estate owned by the testator at the date of his will, and which, but for the alienation, would pass under it.[25] And it has been held, that if the will be made so as to

* [24] Graves *v.* Sheldon, 2 D. Chip. 71. It seems to have been supposed, that a devise of an estate by name, which the testator had contracted to sell, would only pass the legal estate, for the purpose of enabling the devisee to carry the contract into effect. Knollys *v.* Shepherd, cited by the Master of the Rolls in Wall *v.* Bright, 1 J. & W. 499. In this case, the Lord Chancellor thought the purchase-money would not pass under the devise, but unless there was some special reason leading to that conclusion, it would seem natural to conclude such would be the purpose of such a devise. It ought to be construed a devise of the estate subject to the contract, and of the price, when that came into the place of the estate. Ante, n. 14.

[25] Hawes *v.* Humphrey, 9 Pick. 350; Brush *v.* Brush, 11 Ohio, 287; Carter *v.* Thomas, 4 Greenl. 341; Skerrett *v.* Burd, 1 Whart. 246; M'Rainy *v.* Clark, Taylor, 278; M'Taggart *v.* Thompson, 14 Penn. St. 149; Floyd *v.* Floyd, 7 B.

operate upon both real and personal estate, and subsequently the real estate be conveyed by the testator so as to revoke the will as to the real estate, it will then attach as a will of personalty merely, and after that may be revoked in any mode which is effectual to revoke a will of personal estate.[26]

* 14. And where the testator devised certain portions of his real estate to his several children, and among others to his two daughters, and gave the residue of his estate to be equally divided amongst all his children, and subsequently sold and conveyed a portion of that devised to his daughters, taking back a bond and mortgage to secure the purchase-money, it was held to have revoked the devise to his daughters, as to the portion so sold, and that the securities became, by the transaction, a portion of the residuum of the estate, to be divided equally among all the children under the residuary clause in the will.[27] And a lease for ninety-nine years, with the right in the lessee to extinguish the reversion by the payment of a fixed sum, will revoke a devise of the same estate.[28]

15. A valid agreement or covenant to convey, which a court of chancery will specifically enforce, will operate in equity as a revocation of a former devise of the same estate.[29] This rule is maintained in equity, upon the ground that, from the date of the contract, the estate is regarded as the real estate of the vendee, the same as if it had been conveyed.[29] And even where the * tes-

Mon. 290; Arthur *v.* Arthur, 10 Barb. (S. C.), 9; *Sargeant*, J., in Wharton, 250; Bowen *v.* Johnson, 6 Ind. 110; Epps *v.* Dean, 28 Ga. 533; Wells *v.* Wells, 35 Miss. 638.

[26] Brown *v.* Thorndike, 15 Pick, 388. It seems clear that the purchase of additional real estate by the testator, after the date of his will, cannot operate to revoke the will, whether the estate pass under the will or not. Blandin *v.* Blandin, 9 Vt. 210.

[27] Adams *v.* Winne, 7 Paige, 97; Beck *v.* M'Gillis, 9 Barb. Sup. C. 35. But in Alabama, it would seem that the subsequent execution of a deed of the same land devised, is not a revocation of the will per se, or unless the intention to revoke the will plainly appears, and it was held, that it is not to be so regarded where the deed is liable to be set aside for fraud, or where a large portion of purchase-money remains unpaid. Nor is a subsequent mortgage of a portion of the estate to the sole beneficiary, under the apprehension that the will is invalid, a revocation. Stubbs *v.* Houston, 33 Ala. 555.

[28] Bosley *v.* Bosley, 14 How. (U. S.), 390.

[29] 4 Kent, Comm. 528; Cotter *v.* Layer, 2 P. Wms. 623; Rider *v.* Wager, id. 382; Mayer *v.* Gowland, Dickens, 563; Knollys *v.* Alcock, 5 Vesey, 654; Vawser

tator conveys the estate, and it reverts back again, by the same instrument, or otherwise, it will operate to revoke a prior devise of the same.[30]

16. The sale and conveyance of so large a portion of the real estate devised, as to render it impracticable to give effect to the dispositions of the will, operates as a revocation of the will.[31] And the mortgage of a portion of the estate will operate to revoke a devise of the same pro tanto, as much as an absolute conveyance.[32]

17. So a grant in fee of the estate devised, reserving rent, with a clause of reëntry, operates to revoke the devise.[33] And the conveyance of the estate to the devisee operates to revoke the will, and the destruction of the deed during the lifetime of the testator, will not enable the devisee to take under the will, unless there was a republication.[34]

18. It has been held, that a conveyance in trust during the life of the testator will not operate as a revocation,[35] nor will a commission of lunacy antedating the conveyance.[35] Nor will a conveyance in trust to pay debts, with an express reservation of the reversion thereafter.[36]

19. It has been held, that where a deed conveys land in trust, for such uses as are declared in the will of the grantor, already made, it creates an irrevocable trust, unless some power of revocation is reserved in the deed.[37] But if the conveyance be to such uses as the grantor may thereafter declare by his will, then * it is competent for the testator, from time to time, to make and alter such appointment; but it is otherwise where the appointment is by deed, and no power of revocation reserved.[38] A will made in exe-

v. Jeffrey, 2 Swanst. 268; Walton *v.* Walton, 7 Johns. Ch. 258. But in Hull *v.* Bray, Coxe, 212, it was held, that a mere agreement to sell the land devised, made after the date of the devise, will not effect a revocation.

[30] Walton *v.* Walton, 7 Johns. Ch. 258.

[31] In Re Cooper's Estate, 4 Barr, 88

[32] M'Taggart *v.* Thompson, 14 Penn. St. 149; Temple *v.* Chandos, 3 Vesey, 685.

[33] Herrington *v.* Budd, 5 Denio, 321.

[34] Kean's Will, 9 Dana, 25.

[35] Hughes *v.* Hughes, 2 Munf. 209.

[36] Jones *v.* Hartley, 2 Whart. 103. Nor will the incurring of debts that swallow up the estate have that effect. Wogan *v.* Small, 11 S. & R. 143; Vernon *v.* Jones, 2 Freem. 117.

[37] Mayor of Baltimore *v.* Williams, 6 Md. 235.

[38] Clingan *v.* Mitcheltree, 31 Penn. St. 25.

cution of a power is ambulatory and revocable the same as any other will.[39]

20. Where the testator had bequeathed all his property to his wife, a subsequent conveyance of a portion of the testator's real and personal estate to trustees, for the use of the wife, was held not to amount to a revocation of the bequest.[38]

SECTION IV.

BY VOID CONVEYANCE, OR AN ATTEMPT TO CONVEY ESTATE.

1. A conveyance inoperative, as such, will revoke a devise of the same estate.
2. But it should clearly appear such was the intention of the grantor.
3. Thus a void conveyance to charitable uses, will not operate to revoke a devise.
4. And so of the deed of a feme covert.
5. And a deed void, for fraud, will not revoke a devise.

§ 27. 1. It seems to have been considered, in the English courts, that, by the statute of frauds, any attempt to convey the estate devised, which showed a clear intent to revoke, should be held to have that effect, notwithstanding the conveyance failed to take effect, through the incapacity of the guarantee, or from the want of some indispensable ceremony.[1] Thus a feofment, without livery of seizin, and a bargain and sale, without enrolment, although inoperative to pass the title, * operate to revoke a previous devise of the lands thus attempted to be conveyed.[2]

2. In Shove *v.* Pincke,[3] it is put upon the ground that the conveyance was intended to operate as a revocation of the will. Lord *Kenyon*, Ch. J., said, "If it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And it would seem, upon just principles of construction, that a deed for one purpose, and which could not operate in the mode

[39] Van Wert *v.* Benedict, 1 Bradf. Sur. Rep. 114; Southby *v.* Stonehouse, 2 Ves. Sen. 610, 612; Cotter *v.* Layer, 2 P. Wms. 623; Duke of Marlboro' *v.* Godolphin, 2 Ves. Sen. 61, 75.

[1] Bead *v.* Beard, 3 Atk. 72. This was a deed of gift by the testator to his wife, of personal estate, and it was held, that it operated to revoke the will, but as it could not operate in favor of the wife, the property must be distributed.

[*2] 1 Jarman, 153; Mountague *v.* Jeoffereys, Moor, 429, pl. 599.

[3] 5 Term. R. 124; Lord *Eldon* in Vawser *v.* Jeffrey, 2 Swanst. 274.

intended, should not be allowed to operate in a different mode, and which would have been only a consequence of its intended operation, which had failed, unless it appeared that it was the intention of the grantor to have the consequence follow, even if the principal purpose failed.

3. And it has been decided, that a conveyance to charitable uses, which could not operate on account of the statute of mortmain,[4] the grantor having deceased within twelve months of the date of the conveyance, did not revoke a prior devise of the same estate.[5]

4. So, also, a deed made by one under personal disability, as a feme covert, will not operate to revoke a devise.[6] But a feme covert, who has a power of appointment, either by will or deed, and who makes a will in execution of such power, may afterwards, by deed, revoke such execution, she having become a feme sole by the death of her husband.[7]

5. There seems to have been considerable controversy, in the English courts, how far a deed, valid at law but void in equity, will operate as a revocation of a devise of the estate so * conveyed, or attempted to be conveyed. But it was finally decided,[8] that a deed executed under circumstances which render it void in equity, but not at law, is a revocation of a former will devising the same estate. But it seems to us that the decision of Lord *Thurlow*,[9] where he held, that if a deed was so void in equity, that a court of chancery must decree its surrender, it could not be held to operate as a revocation of the former devise of the same estate, is most in consonance with the true spirit and reason of the question. His lordship very justly says: "Whoever orders it to be delivered up declares it to be no deed." And it seems

[4] 9 Geo. 2, ch. 36.

[5] Matthews *v.* Venables, 9 J. B. Moore, 286; 2 Bing. 136.

[6] Eilbeck *v.* Wood, 1 Russ. 564.

[7] Lawrence *v.* Wallis, 2 Br. C. C. 3191. This was decided upon the ground that the deed was the real execution of the power, but no stress is laid upon the fact of the decease of the husband.

[8] Simpson *v.* Walker, 5 Simons, 1. The Vice Chancellor, Sir *Lancelot Shadwell*, here reviews the former cases, and decides in conformity with the cases of Hick *v.* Mors, Amb. 215; Hawes *v.* Wyatt, 2 Cox, 263, and the dictum of Lord *Eldon*, in Attorney-General *v.* Vigor, 8 Vesey, 283. But goes counter to the decision of Lord *Thurlow* in Hawes *v.* Wyatt, 3 Br. C. C. 156, where the decision of Lord *Alvanley* is reversed by the Lord Chancellor.

[9] Hawes *v.* Wyatt, 3 Br. C. C. 156.

admitted, on all hands, that if a deed is fraudulent, so as to be void at law, it can have no operation by way of revocation, and this we think the true rule, in regard to all ineffectual deeds, which do not contain an express and formal revocation. If the deed is void, or inoperative, as a deed, it should not be allowed an incidental operation, by way of revocation.[10] A deed executed for an immoral consideration, it has been held, will not revoke a devise of the same land.[11]

SECTION V.

BY SUBSEQUENT WILL OR CODICIL.

1. The substance of the statute of frauds, as to wills, reënacted here, and extended to personalty.
2. Aside from statutory requirements, wills may be revoked by parol.
3. An informal will cannot revoke a formal one. Rule, where will fails, otherwise.
4. Rule as to revocation of will of personalty under statute of frauds.
5. An incomplete revocation never operative.
6. Difference between revoking devise, and revoking portion of will.
7. Revocation must take effect from the time of making.
8. Equity will not correct mistakes in wills, but will inquire as to their extent.
9. Parol evidence may be given of the contents of a lost will.
10. Rule of construction in regard to discrepancies of wills of different dates.
11. It often becomes necessary to resort to indirect proof of the date of wills.
12. A later will may revoke a former one, either expressly, or by implication.
13. How far codicils control will, matter of construction and intent.
14. How far subsequent devise will carry conditions in former devise, &c.
15. It will, if given instead of the former devise.
16. A codicil must, if possible, be so construed, as to operate upon some estate.
17. How far revocation of one office, will affect others in same person.
18. Subsequent will sometimes treated as a codicil merely.
19. Where revocation of one devise shall so operate upon another.
20. Specific devise to trustees not affected by alteration in codicil of residuary devise to same person.
21. But where devise is given in same form as residue, the rule is otherwise.
22. Recitals may aid the construction, but cannot control clear import of words.
23. Clear bequest not revoked by subsequent uncertain direction.
24. How far loose and indefinite expressions amount to revocation.
25. Revocations made by mistake, or upon wrong information.
26. Legacies on the same terms, or in substitution, or addition to others.
27. How far subsequent legacies, in general terms, are subject to former conditions.
28. Law much the same in America as in England. Revocation must be formally executed.

[10] 1 Jarman, 154.

[11] Ford *v.* De Pontès, 30 Beavan, 572.

29. A will once duly executed revokes former wills, and if lost may be proved. Proof.
30. Change of executor, or name of devisee, no revocation. Other cases stated.
31. Mistake as to fact of revocation has no legal effect. Revocation, question of fact.
32. Effect of revocatory clause.
33. Complete will construed to revoke former wills, without words of revocation.
34. Codicil only revokes former will, as far as it so provides, or is inconsistent with it.
35. Statement of other cases of express, or implied, revocation.
36. One will, not construed as revoking another, except so far as it conflicts with it.
37. Where the second will is expressly revocatory, it will so operate, even where it fails for any matter dehors the instrument.
38. Construction of Pennsylvania statute as to disposition of estate, where devise fails.
39, and n. 70. Will destroyed, animo revocandi, cannot be set up by codicil. Revocation by codicil.

*§ 28. 1. THE statute of frauds,[1] requires all revocations of wills, of real estate, to be by writing, signed in the presence of three or four witnesses, declaring the same; or by "burning," &c., and the substance of this provision has been reënacted in most of the American states, and the same provision extended to wills of personal property.

2. If it were not for some such positive restriction upon the revocation of wills, it might be done by a simple declaration to that effect, without writing.[2] But as stated, under former modes of revocation, it must be in the present tense, and not of a mere purpose to do so, at some indefinite future time.[2] There is some difference between the formalities prescribed, in regard to the execution of a revoking will merely, and one intended to operate as a devise, but they are slight and unintentional, probably, and, as most of the American statutes, as well as the late English statute, require the revocation to be executed with the same formalities, as a disposing will, the distinction has thus become of no practical importance. But as most express revocations are made for the purpose of making a new disposition, it is important to consider that point.

3. As stated under the head of alterations and interlineations, a subsequent will, making a new disposition of the estate devised in a former will, but not executed with the requisite formalities to

*[1] 29 Car. II. ch. 3, sec. 6.

[2] Cranvell *v.* Sanders, Cro. Jac. 497; *Montague*, J., here said to the jury, with the concurrence of the court, that, "as one ought to make his will, by his own directions, and not by questions," so ought he also to revoke it.

operate, as a disposing will, shall not have the effect to revoke the prior will.[3] But, as we have said, where the devise fails from the incapacity of the devisee to take, the instrument may operate, as a revocation, where that appears to * have been the intention of the testator, independent of the new devise.[4]

4. And as the statute of frauds did not require, that a will of personalty should be revoked by writing signed by the testator, but only that the testator's intention to revoke should be reduced to writing and allowed by him, and proved to have been so done by three witnesses; it has been held, that a letter written to the person having the custody of the will, by the testator, in the presence of the requisite number of witnesses, directing such person to destroy the will, is a sufficient revocation of the will, even where it was not destroyed during the life of the testator.[5]

5. And if the instrument containing the revoking clause is incomplete, and show, on its face, that the testator had not fully executed it, the same rule applies to it, as to a will left in such incomplete state. It cannot operate as a definitive expression of the testator's purpose of revocation.[6] This question could hardly arise under statutes requiring wills to be revoked with the same formality with which they are executed.

6. A somewhat nice distinction is taken, between the effect of revoking the bequest to one of two or more tenants in common, and revoking that portion of the will which gave the devise to one of the tenants. In the former case, it is well settled, the share of the tenant whose devise is revoked, does not go to the other tenants;[7] but in the latter case, it will have the effect to make the will read as if the portion revoked had never been in the will; that is, the devise will take effect as if the tenants had been so many less

[3] Eggleston *v.* Speke, 3 Mod. 258; s. c. Carth. 79; 1 Show. 89; Onions *v.* Tyrer, 2 Vern. 741; Prec. Ch. 459; 1 P. Wms. 343; Short *v.* Smith, 4 East, 419; Ex parte Earl of Ilchester, 7 Vesey, 348; Kirke *v.* Kirke, 4 Russ. 435; Locke *v.* James, 11 M. & W. 901. But see 1 Jarman, 156; Richardson *v.* Barry, 3 Hagg. 249.

[4] Roper *v.* Constable, 2 Eq. Cas. Ab. 359, pl. 9; s. c. nom. Rooper *v.* Radcliffe, 5 Brown, P. Cas. 360; 10 Mod. 233; Tupper *v.* Tupper, 1 Kay & J. 665.

[5] Walcott *v.* Ochterlony, 1 Curteis, 580; 1 Jarman, 157.

[6] 1 Jarman, 157. This applies only to wills of personalty under the statute of frauds.

[7] Cresswell *v.* Cheslyn, 2 Eden, 123: Humble *v.* Shore, 7 Hare, 247.

in number, and thus the revocation will be made to enure for the benefit of the other tenants.[8]

* 7. That the revocation of wills, by whatever mode, must equally be intended to operate from the time of making, has often been declared, and is an important practical point, to which we have before adverted.[9] If the testator's expressions are declaratory only of a future design, they will not be sufficient to work a revocation.[10] And where the testator, in a subsequent will (having by that and his former will disposed of all his real estate), said: "As to the rest of my real and personal estate, I intend to dispose of the same by a codicil hereafter to be made, to this my will;" this was held no revocation of the provisions of his former will, in regard to the disposition of his real estate.[11]

8. And, although equity does not assume to correct men's wills, under the head of mistake, but follows the rule of law, that a man is presumed to mean what he has expressed in so solemn a form as that required in the execution of last wills and testaments, it will, nevertheless, direct an issue, to determine whether a particular expression, found in the will, forms part of it,[12] as by showing that it was inserted by the mistake of the testator, or of the scrivener, or surreptitiously.[13]

9. In a late case,[14] the subject of receiving parol evidence in

[8] Harris *v.* Davis, 1 Coll. 416.

[9] Ante, n. 2; Burton *v.* Gowell, Cro. Eliz. 306; *Popham*, J., here said: "If he had said, 'I will revoke my will made at Pulham,' this is no present revocation, for it refers to a future act. But where he says, 'It shall not stand,' this takes effect presently."

[10] Cleobury *v.* Beckett, 14 Beav. 588.

[11] Thomas d. *v.* Evans, 2 East, 488; see also, Griffin *v.* Griffin, in note to Mathews *v.* Warner, 4 Vesey, 197.

[12] Powell *v.* Mouchett, 6 Mad. 216. But under the American practice, these questions, except in regard to fraud, must always be presented and tried, it is believed, at the time of probate, whether they affect real or personal estate.

[13] 1 Jarman, 159; Re Merritt, 4 Jur. N. S. 1192; Hughes *v.* Turner, 4 Hagg. 52; Denny *v.* Barton, 2 Phillim. 575.

[14] Brown *v.* Brown, 8 El. & Bl. 876; ante, § 18, pl. 4. The practice in the American courts, of receiving parol evidence of the contents of a lost will, * seems to be universal, and without question, notwithstanding the stringent statutory requirements in regard to the mode of executing wills. Havard *v.* Davis, 2 Binney, 406; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Betts, 6 id. 377; 9 id. 208; Steele *v.* Price, 5 B. Mon. 58; Kearns *v.* Kearns, 4 Harr. 83; Jones *v.* Murphy, 8 Watts & Serg. 275, 300; Gaines' Appeal (Sup. Ct. Louisiana), 4 Am. Law Reg. 364.

And a lost will may be established by the testimony of a single witness, not-

*regard to the fact and intent of the revocation of wills, is very carefully examined, and the principle declared, that where the *tes-

withstanding the statute requires its execution in the presence of two or more. Dan *v.* Brown, supra; Jackson *v.* Betts, supra; Dickey *v.* Malechi, 6 Mo. 177; Kearns *v.* Kearns, supra; Baker *v.* Dobyns, 4 Dana, 220.

But this evidence must come from witnesses who have read the will, and whose recollection of its contents is trustworthy. Chisholm's Heirs *v.* Ben, 7 B. Mon. 408. In Davis *v.* Sigourney, 8 Met. 486, *Wilde*, J., said: "To authorize the probate of a lost will, by parol proof of its contents, depending on the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act on probabilities." "As to some parts of this will, the witness will not swear positively; and this we consider an insuperable objection to the probate of the whole will. It is not such a will as may be proved in part and disproved in part. The testator undertook to make distribution of his estate, in certain shares, between his wife and children; and unless the whole can be proved, his intention will not be effectuated, and therefore no part of the will can be established." Durfee *v.* Durfee, in note, 8 Met. 490; Rhodes *v.* Vinson, 9 Gill, 169. But some cases allow probate of so much of the will as can be satisfactorily established. Steele *v.* Price, supra; Jackson *v.* Jackson, 4 Mo. 210; Dickey *v.* Malechi, supra. But this must be a very unjust rule, unless where it is obvious that the parts proved have no dependence upon the other portions, or upon the distribution among the next of kin, or the heirs. See also, Hylton *v.* Hylton, 1 Gratt. 169; Chisholm's Heirs *v.* Ben, 7 B. Mon. 408; Clark *v.* Morton, 5 Rawle, 235.

And parol proof is admissible to establish a subsequent will, either revoking, or republishing, a former will. Legare *v.* Ashe, 1 Bay, 464; Havard *v.* Davis, supra; Jones *v.* Murphy, supra; Day *v.* Day, 2 Green, Ch. 330. But in such cases, it must be shown that the later will contained an express clause of revocation, or else the precise extent to which it was inconsistent with the former will. Nelson *v.* M'Giffert, 3 Barb. Ch. 158.

But in cases of fraud, more indulgence is allowed to the proof, and in Jones *v.* Murphy, supra, the court said: "It is better, surely, that a person should die intestate, than that the spoliator should be rewarded for his villany." Post, pt. 2, § 1, n. 11. The English courts exhibit great reluctance to admit alleged lost wills to probate, except upon the most satisfactory proof of the contents, and where no ground of suspicion exists, either that the will was revoked, or abandoned by the testator, on the ground of its supposed destruction. In the very late case of Wharram *v.* Wharram, 10 Jur. N. S. 499, where the contents of the will were propounded for probate after a delay of seven years, and no sufficient explanation given of the manner or cause of the loss, and when no draft of the will could be produced, but only oral proof of its contents, due execution, and that it could not have been revoked (the only witnesses being the widow, her niece, and an attorney's clerk related to the widow), probate was denied. And it is here said to be very douhtful, whether, under the present English statute, a lost will can be placed on the footing of an ordinary document as to the admission of secondary evidence of its contents. And in Quick *v.* Quick, 10 Jur. N. S. 682, S. C., 3 Sw. & Tr. 442,

tator executed a will, and subsequently executed another, which he took away with him, and which on his decease could not be found, the earlier one being found, that the solicitor who drew the will, or any other witness familiar with its contents, might give evidence thereof; and it appearing, that the provisions of the later one were inconsistent with those of the former, it was held to amount to a revocation: But if the second will was last seen in the custody of the testator, and could not be found, that it raised a presumption that he had destroyed it animo cancellandi, and cast upon those seeking to establish the will, the onus of rebutting this presumption.[15]

10. The mere fact, that one is shown to have made a subsequent will, does not amount to a revocation of the former one, unless it appear that it contained an express clause of revocation, or that its contents were inconsistent with those of the former.[16] And where the same estate is given to different persons, in two wills of different dates, the later bequest is an entire revocation of the former.[17] But where the same property is given in the same will to different persons, such persons take as tenants in common, there being no sufficient ground to presume that the testator had changed his pur-

it was held that the contents of a lost will could not be established by the declarations of the deceased to his wife and others as to the disposition of the instrument; but, as before stated, the declarations of the testator up to near the time of his death are admissible to rebut the presumption of revocation by destruction. Whiteley *v.* King, 10 Jur. N. S. 1079, ante, § 25, pl. 52. And where a person who has himself destroyed a testamentary paper, after the death of the alleged testator, asks for probate of the substance thereof, as contained in a copy or otherwise, the court will expect the fullest and most satisfactory proof of all the facts necessary to be established. Moore *v.* Whitehouse, 3 Sw. & Tr. 567.

The rules of practice in regard to proof of lost wills is discussed in Everitt *v.* Everitt, 41 Barb, 385; Youndt *v.* Youndt, 3 Grants Cas. 140.

[15] Cutto *v.* Gilbert, 9 Moore, P. C. C. 131; Helyar *v.* Helyar, 1 Phillim. Rep. of Lee's Judgments, 472, 510. The same doctrine is recognized extensively in the American courts. Ante, § 25, n. 88. Legare *v.* Ashe, 1 Bay. 464; Clark *v.* Wright, 3 Pick. 67; Idley *v.* Bowen, 11 Wend. 227; Betts *v.* Jackson, 6 Wend. 173; Brown *v.* Brown, 10 Yerger, 84; M'Beth *v.* M'Beth, 11 Ala. 596; Weeks *v.* M'Beth, 14 id. 474; Clark *v.* Morton, 5 Rawle, 242; Jones *v.* Murphy, 8 Watts & Serg. 275; Steele *v.* Price, 5 B. Mon. 68. But this is only a presumptio juris, and not juris et de jure. Lord *Campbell*, in Brown *v.* Brown, 8 Ellis & Bl. 884, 885; Steele *v.* Price, supra; Jones *v.* Murphy, supra.

[16] Cutto *v.* Gilbert, supra; Freeman *v.* Freeman, 5 DeG., M. & G. 704.

[17] Evans *v.* Evans, 17 Sim. 107.

pose while making his will.[18] * According to the English practice, it must not only appear that the testator made a subsequent will, and that it was different from the former one, but, in order to operate as a revocation, it must appear wherein the later will was different from the former.[19]

11. From different testamentary papers found in the possession of the testator, at the time of his death, not being dated, and there being no direct evidence of the time of their execution, it often becomes necessary to resort to more remote circumstances, in order to determine their date. And the jury must find all the facts requisite to create a revocation.[20] And in order to determine the date of inconsistent wills, it is often necessary to look at the water-mark of the paper, which, when one is dated, will often enable the court, with reasonable certainty, to determine whether the other was executed before or afterwards.[21] And if the relative date of two or more inconsistent wills cannot be determined, they can only operate as far as their provisions can be made to stand together.[22] And this will always be sought for, even where the date of the instruments is known, and the earlier one will only be made to yield its provisions where it is found impossible to make them stand with the provisions of the later one.[23]

12. But this rule is not of universal application. Where it is obvious, from the form or mode in which the later will is * expressed, that it was intended to be the whole will of the testator, as where it contains an express clause of revocation, as to all others, or where, from the manner in which the instruments were kept by the testator, or the later one beginning: "This is the last will," &c., or in any other mode, it appears, in conformity with the existing statute, that the later will was intended to operate exclusively, it

[18] 1 Jarman, 160.

[19] Goodright *v.* Harwood, 3 Wils. 497, where the revocation is held good; s. c. reversed in Cowp. 187, and this judgment affirmed in the House of Lords, 7 Brown, P. C. 489. See also, Plenty *v.* West, 6 C. B. 201.

[20] Goodright *v.* Harwood, Cowp. 92. Under the statute of frauds, it is here said, if the testator destroys his second will, his former one being preserved by him, this will leave the first will in force. But it seems otherwise held, under the present English statute. Plenty *v.* West, supra. See also, ante, § 25, n. 62.

[21] 1 Jarman, 160. But this mark is sometimes dated the year following its manufacture.

[22] Phipps *v.* The Earl of Anglesey, 7 Br. P. C. 443.

[23] 1 Jarman, 161; Plenty *v.* West, supra; Weld *v.* Acton, 3 Eq. Cas. Ab. 777, pl. 26.

will be so treated. The most obvious exceptions to this rule are, where the later will does not dispose of the testator's whole estate, or where it is termed in the instrument a codicil, which indicates that it is a mere supplement, by way of addition or correction, of the will itself.[24]

13. The question, to what extent a codicil shall control the provisions in the will, is not always easy of solution. Each case depends almost exclusively upon its own peculiar circumstances, and will not, therefore, be much guide to others, unless the facts are very similar. But the general rule of construction is that already stated, to allow all the provisions of the will to stand, which are not inconsistent with those of the codicil, and in determining this, to seek for the intention of the testator, as far as practicable.[25]

14. But one devise is not to be held revoked, further than is absolutely necessary, by a subsequent inconsistent devise, nor unless, or until, the subsequent devise can take effect.[26] And it is laid down by some writers, that where land is devised, subject to a charge to one person, and subsequently devised to another * person, without naming the charge, it still remains upon the land, in the hands of the second devisee.[27] But the cases cited in confirmation of this proposition, go only to show, that the legacies were not intended to be revoked, and do not seem to clearly establish the proposition, which does not appear entirely consistent with the probable intent of such a change in one's will, under ordinary circumstances.[28] And it seems clear that general words will not, ordinarily, be held a revocation

[24] Plenty *v.* West, 6 C. B. 201; 1 Rob. 264; Cookson *v.* Hancock, 1 Keen, 817; s. c. 2 My. & Cr. 606.

[25] The following cases will be found to have some bearing upon the question. Doe d. *v.* Hicks, 8 Bing. 475, 1 Cl. & Fin. 20; Hicks *v.* Doe, 1 Yo. & J. 470; Alexander *v.* Alexander, 6 De G., M. & G. 593; Agnew *v.* Pope, 1 De G. & J. 49; Patch *v.* Graves, 3 Denio, 348; Cookson *v.* Hancock, supra. And a question often arises in regard to qualifications of a bequest being continued, where the bequest is repeated. Where the codicil named the wife as "sole executrix, of this my will," it was held that the appointment of other executors in the will was revoked. Lowe, in re, 3 Sw. & Tr. 478. The general effect of a subsequent will in revoking one of an earlier date, by reason of its inconsistent provisions, is very extensively discussed in the late and important case of Colvin *v.* Warford, 20 Md. 357.

[26] Duffield *v.* Duffield, 3 Bligh, N. S. 260; 1 D. & Cl. 268, 395; Re Colshead, 2 De G. & J. 690.

[27] 1 Jarman, 162; Beckett *v.* Harden, 4 Maule & Sel.

[28] Ravens *v.* Taylor, 4 Beavan, 425; Lushington *v.* Boldero, G. Cooper, 216; Clarke *v.* Butler, 1 Mer. 304.

of a specific devise or bequest, where it is apparent such could not have been the intent of the testator.[29]

15. Where a codicil gave a devise, in terms described as being "instead" of one contained in the will, but failed to dispose of the ultimate fee in the estate devised by the codicil, it was held, that it must go according to the conditions expressed in the will.[30] It was held, that the terms, "instead of the devise and bequest contained in my said will," were satisfied, by holding it to be a substitute for that, only to the extent that the disposition in the codicil was inconsistent with that contained in the will.[31]

16. As a general thing, a codicil will be construed as operative upon some portion of the estate, even where its terms, literally interpreted, would be found to have no operation.[32] But, as we have before said, the codicils will be construed as * being consistent with the will, where the discrepancy claimed is not obviously intended by the testator.[33]

17. And where the same person is appointed to more than one of the offices of guardian, trustee, or executor, a revocation of his office, in one particular, will not operate to revoke the other offices.[34] But in some cases it may be apparent, from the will, that these appointments were intended to be united in the same person,[35] and if so, the revocation of one office will revoke the others. And where a legacy was given to the testator's trustees and executors, "*as a mark of his respect for them*," it was held, not to be revoked, by a codicil, appointing other trustees, in their room, and giving a

[29] Barclay *v.* Maskelyne, 5 Jur. N. S. 12. See also, Hill *v.* Walker, 4 Kay & J. 168; Butler *v.* Greenwood, 22 Beavan, 303; Arrowsmith's Trusts, 6 Jur. N. S. 1231; S. C. 7 id. 9.

[30] Doe d. Murch *v.* Marchant, 6 Man. & Gran. 813.

[31] By *Tindal*, Ch. J., in Doe d. *v.* Marchant, supra.

[32] Earl of Hardwicke *v.* Douglas, 7 Cl. & Fin. 795; S. C. before the chancellor, Lord *Cottenham*, 5 L. J. N. S. 25, where his lordship held the codicil could have no operation, and which opinion was adhered to by his lordship, in the House of Lords, where the opinion was reversed.

[33] Inglefield *v.* Coghlan, 2 Coll. 247; Evans *v.* Evans, 17 Sim. 108. See also, Lee *v.* Delaine, 4 De G. & Sm. 1.

[34] Ex parte Park, 14 Sim. 89; Graham *v.* Graham, 16 Beavan, 550; Cartwright *v.* Shepheard, 17 Beavan, 301; Worley *v.* Worley, 18 Beavan, 58; Hare *v.* Hare, 5 Beavan, 629.

[35] Barrett *v.* Wilkins, 5 Jur. N. S. 687. Here the codicil substituted the new appointment to one office, by name, and gave the same powers given "throughout my will."

legacy of the same amount to the newly-appointed trustees and executors, in similar language.[36] And where the testator uses terms, in a peculiar sense, in his will, the same terms will ordinarily, but not always, have the same import, in a codicil, so as not to disturb the will more than is indispensable.[37]

18. And a later will is often treated, as being merely in the nature of a codicil, intended to supply the deficiencies of the will, and to make desired alterations of the same. And in this view, a specific devise of real estate was held not revoked by a subsequent will, making a general residuary devise to a different person.[38]

* 19. Lord *Camden* held,[39] that where one devised his freehold estates to trustees, for certain uses, and subsequently devised certain leasehold estate, to be held for the same uses, "so that they shall not be separate;" and thereafter suffered a recovery of the freehold estates, which operated as a revocation of the devise of such estates, that this operated as a revocation of the devise of the leasehold estate. But his decree was reversed in the House of Lords, upon this point.[40]

20. And where a specific devise to trustees, for the benefit of the residuary legatee after named, was given in the will, and, by codicil, the testator gave the residue to the former legatee, and another jointly, it was held, this did not affect the specific devise to trustees for the sole benefit of the legatee just named. Sir *William Grant*, M. R., laid stress upon the fact, that the will manifested a dispo-

[36] Burgess *v.* Burgess, 1 Coll. 367. But a legacy to one as executor, or by the name of the office merely, must fail when the office is changed. Lord *Eldon*, Chancellor, in Roach *v.* Haynes, 8 Vesey, 593.

[37] Hearle *v.* Hicks, 1 Cl. & Fin. 20; Evans *v.* Evans, 17 Simons, 86, s. c. nom. Williams *v.* Evans, 1 Ellis & Bl. 727.

[38] Freeman *v.* Freeman, 5 DeG., M. & G. 704. And where a subsequent will was so defective, that, unless taken in connection with the former one, there would arise an intestacy as to a considerable amount, by reason of the imperfect nature of the residuary clause, they were both admitted together to probate, as the last will. Lemage *v.* Goodran, 14 W. R. 508; ante, § 23*a*, pl. 15.

[*39] Darley *v.* Darley, Ambler, 653.

[40] 3 Br. P. C. Toml. 359. But in Beauclerk *v.* Mead, 2 Atk. 167, it seems to be considered, that where the testator directed, in his will, that his personal estate be laid out in land, to be settled in the same way as his freehold lands were in the will, and then, by codicil, made a new disposition of the residue of his lands, tenements, and hereditaments, that the personal estate did not follow this new disposition. See also, 1 Jarman, 166; Salter *v.* Fary, 12 L. J. Ch. 411.

sition in the testator to keep the specific devise in the hands of trustees, and separate from the general residuum of his estate.[41]

* 21. But where the residue of the estate is given, in the same way as a prior specific devise, which is changed by codicil, it was held, that the residue followed the new direction.[42]

22. A mere recital, by way of explaining the testator's purpose, or motive, may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear.[43] As where, by a codicil, reciting a specific and limited purpose, the testator proceeds to revoke the whole devise made in his will, declaring the trusts again, with the proposed alteration, and confirms the will in every particular, not thereby altered or revoked: the omission of one trust, although contrary to the intention of the testator, cannot be supplied.[44] And it was held, that the confirmation of the will, in every particular not thereby altered or revoked, were mere words of course, and did not refer to this particular devise, which was both revoked and altered, by the express terms of the codicil.[45] Mr. Jarman considers this case as having virtually overruled

[41] Roach *v.* Haynes, 6 Vesey, 153. This judgment is affirmed in 8 Vesey, 584, by Lord *Eldon*, Chancellor, but with more than his usual hesitation, and merely upon the ground, that among doubts and conjectures, "the opinion of the Master of the Rolls is the better opinion." See also, Francis *v.* Collier, 4 Russell, 331. This case is put upon the ground, that the testator referred one bequest to the same terms expressed with reference to another, in order to save repeating, and not because he intended they should, in every event, follow the same track. But where the testator directed certain chattels, in his mansion-house, such as pictures, books, &c., should be annexed to the mansion, and be inherited and enjoyed by the persons who should succeed to his real estate, *under the limitations in his will*, and by a codicil changed these limitations to other persons, it was held, that this had the effect to change the direction of the chattels to the same extent. Evans *v.* Evans, 17 Simons, 108.

[42] Lord Carrington *v.* Payne, 5 Vesey, 404. This case is put upon the ground, that the codicil produced no revocation, but only a substitution of other names in the will.

[43] Sir *William Grant*, M. R., in Cole *v.* Wade, 16 Vesey, 46.

[44] Holder *v.* Howell, 8 Vesey, 97. Sir *William Grant*, M. R., here said: "It was by a slip, I believe, that he omitted" to do "as he had by the will, . . . but he did not do so. It is forgetfulness; omission which the court cannot supply. It is a misfortune . . . whatever conjecture I may have, there are no materials in this codicil from which I can supply the omission, which I suppose has accidentally taken place."

[45] Sir *William Grant*, M. R., in Holder *v.* Howell, 8 Vesey, 103.

Mathews *v.* Bowman,[46] where the residue of an estate being given to the testator's daughters, as tenants in common, and a codicil, made for a particular purpose, redevised it to them, omitting the words of severance, and it was held, that the legatees took as tenants in common.

* 23. Where property is specifically bequeathed, in terms admitting of no question, this bequest will not be held to be revoked by a subsequent bequest, so imperfectly written as to admit of great uncertainty what was intended, although there seems a high degree of probability that it might include some of the same articles.[47] And where the codicil refers to a legacy in the will, as being £200, when it was in fact £300, it was held not to have the effect to reduce it.[48] And where the testator gave legacies of £200 each, to *seven* of the children of J. B., and by a codicil revoked all these legacies, and gave legacies of £200 to Samuel, and *four* of the children of J. B. by name; and by a second codicil, cancelled all the legacies given in *his will* to the children of J. B., and by a third codicil, revoked the legacy given by a previous codicil to Samuel, it was held, that the legacies given to the four children, by the first codicil, were not revoked.[49]

[46] 3 Anstr. 727, whom Mr. Jarman pronounces, "a reporter of very doubtful authority."

[47] Goblet *v.* Beechy, 2 Russ. & My. 624. This case is made the subject of very extensive commentary in Sir James Wigram's excellent treatise upon Extrinsic Evidence, in aid of the Interpretation of Wills. See Baldwin *v.* Baldwin, 22 Beavan, 413.

[48] Gorden *v.* Hoffman, 7 Sim. 29; Mann *v.* Fuller, Kay, 634.

[49] Benny *v.* Benny, 3 Beavan, 109; Pratt *v.* Pratt, 14 Sim. 129; Sawrey *v.* Rumney, 5 De G. & Sm. 698; Stokes *v.* Heron, 12 Cl. & Fin. 161. A reference in the codicil to the will, by the words, "*my will*," is generally construed to embrace all the existing testamentary papers in force. Crosbie *v.* Macdoual, 4 Vesey, 610. And the recognition of a prior revoked will, by date or otherwise, as the will on which the codicil is founded, shows an intention, and will have the effect, to revive it. Payne *v.* Trappes, 1 Rob. 583; s. c. 11 Jur. 854; Re Chapman, 1 Rob. 1, 8 Jur. 902. And where one confirms his will, in every other respect, except some specific alteration named, it raises a presumption against any other changes. Crosbie *v.* Macdoual, supra. And where the codicil refers to the former of two inconsistent wills, by date, as the last will of the testator, it has the effect to cancel the intermediate will, and evidence of mistake cannot be admitted. Id. See Lord Walpole *v.* Lord Orford, 3 Vesey, 402. The Master of the Rolls, Sir *R. P. Arden*, in Crosbie *v.* Macdoual, said: "It is perfectly true, that if a man ratifies and confirms his last will, he ratifies and confirms it * with every codicil that has been added to it." And the learned judge here pointed out

* 24. And where legacies were given to a class of persons, "except A., who is not intended to take any benefit under any will or codicil," it was held, that these words did not amount to a revocation of an express gift, by the will, to A.[50] But where a testator made a codicil, without professional assistance, his expressions are not to be construed, literally and technically, if upon the whole instrument it appear, that he intended to use them in a different sense;[51] and in such case, where the intention to revoke is obvious, effect will be given to it, although loosely expressed.

25. And it has been held, that where the testator revokes a legacy upon the ground, or assigning as a reason, that the legatee is dead, and which proves unfounded, the revocation * shall not take effect,[52] the revocation being regarded, in such cases, as merely conditional.[53] But if the legacy, or the revocation, be made dependent merely upon the information received by the testator, or his belief, or opinion, it seems the act will be held valid, notwithstanding the testator might have been misinformed, or under a misapprehension.[54] And where the testatrix revoked a legacy given to the chil-

the essential difference between codicils made after the execution of a will, and the making of a later will, professing to contain an entire disposition of the testator's estate. In the former case, the instrument is treated as part of the will, "as much as if it were written upon the same paper." Pigott *v.* Waller, 7 Vesey, 96; Monck *v.* Monck, 1 Ball & Beatty, 298. But a subsequent will supersedes the earlier one, and both are not proved, unless the latter shows that it was intended to be coupled with the former one. See also, Gordon *v.* Lord Reay, 5 Sim. 274; Wade *v.* Nazer, 1 Rob. 627. Ratifying the will, and certain codicils by name, does not operate to revoke the other codicils, by implication. Smith *v.* Cunningham, 1 Add. 448; unless there is something in the papers, or the circumstances, to indicate such an intention. Greenough *v.* Martin, 2 Add. 239. A reference to a former will, by a wrong date, will not defeat the effect of the revocation, or republication, as the case may be, if it be clear, otherwise, which will was intended. See cases above referred to, and Lord Walpole *v.* Cholmondely, 7 T. R. 138. And writing the codicil upon the same piece of paper as the former will, is held, in the ecclesiastical courts, sufficient evidence of an intention to treat it as the subsisting will, and especially where the later will was out of the testator's possession, and he had no opportunity of canceling it. Rogers *v.* Pittis, 1 Add. 30; Lord Ch. B. *Eyre*, in Barnes *v.* Crowe, 1 Ves., Jr. 486, 497; Guest *v.* Willasey, 2 Bing. 429.

[50] Cleoburey *v.* Beckett, 14 Beavan, 583; Agnew *v.* Pope, 1 De G. & J. 49.

[51] Read *v.* Backhouse, 2 Russ. & My. 546; Pilcher *v.* Hole, 7 Sim. 208; Ellis *v.* Bartrum, 25 Beavan, 107.

* [52] Campbell *v.* French, 3 Vesey, 321.

[53] Doe d. Evans *v.* Evans, 10 Ad. & Ellis, 228.

[54] Lord Chancellor *Eldon*, in Gordon *v.* Gordon, 1 Mer. 148, 149; Attorney-General *v.* Lloyd, 3 Atk. 551; s. c. 1 Ves. Sen., 32, where Lord Chancellor *Hard-*

dren of B, and gave the same to A, assigning as a reason, "as I know not whether any of them are alive, and if they are well provided for," it was held a good legacy to A, the construction being, that if the first legatees are living, they are well provided for.[55] The general rule, that legacies and revocations founded in mistake shall not operate, seems very questionable, in principle, since if the testator sees fit to act upon what knowledge and information he possesses, it is the same, in fact, as if he had said, "having been informed, or believing." There can be no doubt he acts upon belief, in all such cases, as much as if he had so expressed himself. But where one makes a legacy, or revocation, chiefly dependent upon the fact of another legatee's being dead, it can admit of no question, if such proves not to be the fact, it cannot take effect. And where such assumed fact is assigned merely as the *reason* for the act, it seems to us to be the same, in principle, as where he declares, in terms, that he proceeds upon "information and belief," and that in both cases, where the testator assumes the responsibility of making a new * disposition of his estate, it is in fact, and in law, binding and valid. But the decisions seem to have established the contrary doctrine.

26. It seems to be well settled, that where legacies are given expressly upon the same terms as former ones;[56] or where one legacy is given in substitution for another;[57] or where it is given in addition to a former legacy,[58] it will be so construed as to be raised out of the same fund, and subject to the same conditions as the former one.[58]

wicke, after the suggestion of numerous doubts, sent the question to a court of law, as being one of pure law. See also, Willett *v.* Sandford, 1 Vesey, 178.

[55] Attorney-General *v.* Ward, 3 Vesey, 327. And where a bequest to A was treated in a codicil as a bequest to B, and as lapsed by his death, and a new disposition was therefore made, it was held no revocation. Barclay *v.* Maskelyne, 1 Johns. 124.

[56] Lloyd *v.* Branton, 3 Mer. 108; Gloucester *v.* Wood, 3 Hare, 131; 1 Ho. L. Cas. 272.

[57] Cooper *v.* Day, 3 Mer. 154.

[58] Crowder *v.* Clowes, 2 Ves. Jr., 449; Hammond *v.* Hammond, 2 Bland, 306. See also, Russell *v.* Dickson, 2 D. & War. 138; Day *v.* Croft, 4 Beavan, 561; Burrell *v.* Earl of Egremont, 7 Beavan, 223; Cator *v.* Cator, 14 id. 463; Warwick *v.* Hawkins, 5 De G. & S. 481. But the effect of the context may qualify its incidents, and show that it is not subject to the same terms, in regard to the same party. Overend *v* Gurney, 7 Sim. 128; King *v.* Tootel, 25 Beavan, 23; Haley *v.* Bannister, 23 Beavan, 336. See also, Martin *v.* Drinkwater, 2 Beavan, 215;

27. But it has never been held, that where the former legacy is given for life, or with limitation, to other parties, that a second legacy will not go to the same parties, or be limited to an estate for life, where it is given in general terms.[59] But whether subsequent legacies shall be subjected to the same terms and conditions, depends often upon slight circumstances connected with the particular case.[60] And where, in the will, distribution is made among several legatees, and the residue is directed to be distributed among the several legatees in proportion to their several legacies, herein before given; and by * codicil additional sums are given to some of the legatees, and the codicil directed to be taken as part of the will, the proportion is not changed by the codicil.[61]

28. The American cases have followed, in the main, the course previously adopted by the English courts, but it will be more intelligible to consider them separately. It has been held, that a revocation is not valid, in most of the American states, unless done with the same formality required in the execution of the will itself.[62] Thus, writing the word "obsolete" on the margin of his will, by the testator, but without signing the same in any of the modes allowed by law, will not amount to a revocation.[63]

Bristow *v.* Bristow, 5 Beavan, 289; 7 Sim. 237; Fenton *v.* Farrington, 2 Jur. N. S. 1120; Leacroft *v.* Maynard, 1 Ves. Jr., 279.

[59] More's Trust, 10 Hare, 171; Mann *v.* Fuller, Kay, 624; Bonner *v.* Bonner, 13 Vesey, 379; Brudenell *v.* Boughton, 2 Atk. 23; Williams *v.* Hughes, 24 Beavan, 474.

[60] Johnstone *v.* The Earl of Harrowby, 6 Jur. N. S. 153; Fitzgerald *v.* Field, 1 Russ. 428; Sherer *v.* Bishop, 4 Br. C. C. 55.

[61] Hall *v.* Severne, 9 Sim. 515.

[62] Reid *v.* Borland, 14 Mass. 208; Laughton *v.* Atkins, 1 Pick. 535; Hine *v.* Hine, 31 Penn. St. 246.

[63] Lewis *v.* Lewis, 2 W. & S. 455. And in Parish *v.* Parish, 42 Barb. 274, it was decided that there could be no occurrence, by way of birth or death of relatives or legatees, or any other change of circumstances, which could amount to an implied revocation of a will, except only such as the statute defined, — marriage and the birth of issue. And in s. c. nom. Delafield *v.* Parish, 25 N. Y. R. 9, it was considered, that even assuming that a testator might have sufficient capacity to comprehend and execute a merely revocatory codicil, without being able to demonstrate sufficient capacity to execute a new will of a complex character, this notion could not be so applied as to uphold a codicil as a revocation, and at the same time leave it inoperative as a testamentary disposition, the former being in some sense dependent upon the latter; nor could it be used as auxiliary to other circumstances, so as to effect a revocation by the combined force of the two agencies; and that, unless the codicil amounted to a revocation under the statutes, it could have no effect.

29. A writing which has been once duly executed as a will, and which has never been revoked, becomes effectual, as such, at the death of the testator, although it be not in existence.[64] But where the testator had become aware of its loss, and omitted to make another will, it affords a presumption of an intention to revoke, but this may be rebutted by other testimony, and the declarations of the testator are admissible to show his intention in regard to that question.[64]

30. And it has been held, that neither the change of the executor, or the striking out the name of a devisee, will so far revoke the will as to require a republication.[65] A will of land, in some states, may be revoked by parol republication of a will of an earlier date in writing, and the contents of such will may be proved by parol, in order to judge of the effect of the evidence of republication, there being evidence of the former will being fraudulently concealed.[66]

* 31. Where a former will is destroyed, under the misapprehension that the later one is valid, its legal operation is not defeated.[67] But in another case it was held, such invalid will might still operate to revoke a former one, if in the opinion of the jury it was so intended.[68]

32. A revocatory clause in a will is not always imperative, but its effect depends upon the intention to be gathered from both instruments.

33. An instrument duly executed, as a last will, and which is complete in itself, and adequate for the disposition of the entire estate, will be construed as revoking all former wills, although no words to that affect are used, and notwithstanding it disposes of most of the estate by virtue of a residuary clause.[69]

[64] Steele *v.* Price, 5 B. Mon. 58.

[65] Wells *v.* Wells, 4 Mon. 152, 155.

[66] Havard *v.* Davis, 2 Binn. 406. The mere draught of a will, prepared by the direction of the testator, and corrected by him, and which he afterwards declared was his last will and testament, will operate as the revocation of his former will, as to the personalty. Glasscock *v.* Smither, 1 Call, 479. The memorandum of a will, being proved by two witnesses to be the testator's handwriting, will operate as a revocation of a former will, by early statute in Pennsylvania, the testator having, in the mean time, disposed of a portion of the estate bequeathed by the former one. Arndt *v.* Arndt, 1 S. & R. 256.

[67] Pringle *v.* McPherson, 2 Brevard, 279.

[68] *Benning*, J., in Barksdale *v.* Hopkins, 23 Ga. 332, 341.

[69] In re Fisher, 4 Wis. 254; Simmons *v.* Simmons, 26 Barb. 68.

34. A codicil which does not, in terms, revoke a former will of real estate, nor dispose of the estate in a manner wholly different from the will, only operates as a revocation pro tanto, notwithstanding, that upon its face, it professes to dispose of the whole estate differently from the will.[70]

* 35. And where, in the will, the testator directed the executors to sell the whole estate, converting it into money, and to pay over one-third part of the same to his wife, and by a codicil directed a portion of the real estate to be reserved from the sale, and secured the use of the same to his wife, during life, it was held not to operate, by way of implication, as a revocation of any other portion of the will.[71] It is sufficient evidence of a revocation, that a later

[70] Brant *v.* Willson, 8 Cow. 56. The latest English cases adopt very strict constructions of the provisions of codicils, in order to make them consistent with the provisions of the will. And as the codicil is intended as a mere addition to the will, it is not to be presumed that it was intended to interfere with any * of the specific provisions of the will, unless its language naturally and obviously produces such a result, or the terms of the codicil expressly recognize the alteration. The following decisions, made within the last few years, go upon this view. Lovat *v.* Leeds, 2 Drew. & Sm. 62; Hinchcliffe *v.* Hinchcliffe, id. 96; Molyneux *v.* Rowe, 8 De G., M. & G. 368; Davis *v.* Bennett, 30 Beav. 226. Even where the will names one executor, and the codicil names another, sole executor, it was held, the provisions were not inconsistent, and that both persons named executor were entitled to probate of both papers. Greaves *v.* Price, 32 Law, J. Prob. 113. But a will, disposing of the whole of the testator's property, will operate to revoke a former will, disposing of part of it. Moorehouse *v.* Lord, 9 Jur. N. S. 677, in the House of Lords.

The intention to revoke by a codicil must be as free from uncertainty as the devise. Pillsworth *v.* Morse, 14 Ir. Ch. Rep. 163; Robertson *v.* Boswell, 9 Law. T. N. S. 543. But where the testator had devised his real estate to A, and subsequently, by codicil, said, "I acknowledge B to be my next of kin and heir at law of all my real and personal property," it was held a revocation. Parker *v.* Nickson, 9 Jur. N. S. 451.

A codicil, not so attested as to carry real estate, may, nevertheless, be effective to reduce a legacy, which had been effectually charged on real estate. Coverdale *v.* Lewis, 30 Beav. 409.

A codicil, so far as it is inconsistent with the will, operates as a revocation. Larrabee *v.* Larrabee, 28 Vt. 274.

[71] Collier *v.* Collier, 3 Ohio, N. S. 369. An informal additiou to a will, which neither bears upon the contents or construction of the will, can have no operation by way of revocation. Wickoff's Appeal, 15 Penn. St. 281. An omission to mention a particular codicil, in a clause of republication, in which prior and subsequent codicils are named, may be an implied revocation of the codicil thus

will, inconsistent with the one offered for probate, was made, and fraudulently suppressed.[72]

* 36. In a somewhat recent case in Pennsylvania, the question of revocation arose, in regard to a bequest to charity.[73] The court held, that where there are two wills, in some respects inconsistent, the latter revokes the former only so far as they are inconsistent with each other, unless there is an express clause of revocation. But where the property given specifically in the first will, is in the second contained in a general devise to the same objects, and for the same purpose, and the appointment of other executors, there is a manifest inconsistency, and it evinces an intention that both wills should not stand.

37. An express clause of revocation of former wills, is not impaired, by the failure of the devise contained in the latter will, by reason of the testator dying within the time required by statute to give such a devise validity. Where the second devise failed, not by reason of the defective execution of the will, but by the incapacity of the devisee to take, or by any other matter dehors the will, the first will is nevertheless effectually revoked.[73]

38. By the Pennsylvania statute, where a devise to charity fails by reason of the testator dying within one month after the making of the will, the property thus attempted to be bequeathed goes to the "residuary legatee, devisee, next of kin, or heirs, according to law," and there being no residuary legatee, or devisee, it was held, that it went to the next of kin, or heir at law, in the same manner the same property would have gone had there been no will.[73]

omitted, but such implication may be rebutted by other circumstances. Id. See also, Hays *v.* Horden, 6 Barr, 409.

[72] Jones *v.* Murphy, 8 W. & S. 275.

* [73] Price *v.* Maxwell, 28 Penn. St. 23; Hairston *v.* Hairston, 30 Miss. 276. But it has been held, in some of the states, that although an express clause of revocation operated proprio vigore to annul the former wills of the testator, that an implied revocation, resulting from the fact of making another will, and its containing provisions inconsistent with the former, or from its containing a disposition of the entire estate of the testator, was ambulatory, and did not become operative for purposes of revocation, unless left in being and in force at the decease of the testator. S. P. in the late and ably considered case of Colvin *v.* Warford, 20 Md. 357. *Hosmer*, Ch. J., in James *v.* Marvin, 3 Conn. 576, 578; ante, § 25, pl. 45.

*39. The testator made his will in 1858, by which all former wills were expressly revoked. He made another will in 1859, slightly altering the dispositions of his estate. In 1860 he made a codicil, which began by expressing a desire to have it treated as a codicil to his will of 1858, but it contained no other words of confirmation, or revocation, and contained no other provision, except the wish to have it treated as a codicil to the will of 1858, which was not equally applicable to the will of 1859. It was held, that as the will of 1858 was not in writing at the time of the execution of the codicil, it could not be revived by, or incorporated into it, or be admitted to probate.[74] And it was also held, that as the codicil of 1860 did not expressly revoke the will of 1859, or dispose of the estate contrary to its provisions, that will, together with the codicil, must be admitted to probate.[74] But, it seems, if the former will had not been destroyed, the effect of the codicil would have been to republish it, although the testator, in giving instructions for drawing the codicil, only expressed a desire to make a certain bequest, and in no way made mention of the will, and it appeared the codicil was not read over to him at the time of execution.[75]

*[74] Rogers *v.* Goodenough, 8 Jur. N. S. 391. Where the testator had made two wills, dated in 1858, and 1859, and destroyed the former one, he applied to the solicitor who drew that one to make a codicil. The codicil expressly referred to the will of 1858, and not to that of 1859, the solicitor being ignorant of its existence. The testator afterwards destroyed the codicil, with the intention of setting up the will of 1859, and died without any other testamentary disposition, and it was held that he died intestate. Newton *v.* Newton, 12 Ir. Ch. Rep. 118.

[75] Lewis in re, 7 Jur. N. S. 220.

*CHAPTER VIII.

REPUBLICATION OF WILLS.

1. Its importance under the statute of frauds.
2. The cases before the present English statute, in regard to personalty especially, of little value.
3. No precise form of words necessary, nor that republication be attached to the will.
4. Revives the will of which it is made part.
5. The legal effect of republication is to make the whole will of that date.
6. Some of the cases say it is the same as if the whole will were written anew.
7. This does not apply to the execution of powers by married women.
8. But alterations in the will are thereby authenticated.
9. Whether a will destroyed, and revived, can be admitted to probate.
10. How far wills of infants and insane persons are affected by republication.
n. 8. The cases reviewed, in regard to republication, and its effects.
n. 19. How far republication will extend the words of the will to new subjects.
11. The law in regard to republication same in America as in England. Act need not be attached to the will.
12. Will executed under undue influence may be republished by subsequent codicil.
13. Codicil may republish an informally executed will.
14. Parol republication invalid. The act must be done with the statutory formalities.
15. Reëxecution of will the same as republication, and does not revive adeemed legacies.
16. The act of republication depends upon the intent of testator. Facts may be shown.
17. A will lost, abandoned, or destroyed, will not be revived by implication.
18. Inchoate revocation no republication. Cases in Pennsylvania and Georgia.
19. Obliteration, by way of alteration, not effectual without republication.
20. Upon a question of republication of one will, by the destruction of another, proof by one witness sufficient.
21. The will of a married woman executed during coverture, not affected by surviving her husband.

§ 29. 1. THE republication of a will was important, under the statute of frauds, since it enabled real estate of the testator, at * the date of the republication, to pass under the will, which, without such republication, would only have passed such real estate as the testator held at the date of the instrument.[1] But the present

*[1] Haven *v.* Foster, 14 Pick. 543, citing Acherly *v.* Vernon, Com. 381; s. c. 10 Mod. 518; Potter *v.* Potter, 1 Vesey, 438; Barnes *v.* Crowe, 1 Ves. Jr. 486;

English statute, and the statutes of most of the American states, providing that all real estates of which the testator may die seized shall pass under the will, this advantage does not result from the republication. But republication is resorted to, for the purpose of reviving a will which had been revoked or otherwise superseded, or for any similar purpose, and is called express republication. This, by the present English statute, and those of most of the American states, is required to be done with the same formalities as those with which wills are required to be executed, and the rule as to express republication was much the same under the statute of frauds.[2]

2. There is a good deal of learning in the English reports and treatises upon wills, in regard to the republication of wills, before the statute of frauds, and in regard to personalty, before the statute of 1 Vict., by parol merely, of which there seems no question.[3] But as that mode of republication does not obtain * in the American states, to any great extent, it would be useless to repeat it here.

3. But in regard to formal, written republications, it may be important to inquire. It seems, that a codicil will amount to a republication of the will, whenever so intended. And for this, no precise form of words is necessary, nor that it be indorsed upon, or attached to the will.[4] But if there be more than one will, the fact

Pigott *v.* Waller, 9 Vesey, 98; Rowley *v.* Eyton, 2 Mer. 137; Goodtitle *v.* Meredith, 2 M. & S. 5; Guest *v.* Willasey, 2 Bing. 429; Mooers *v.* White, 6 Johns. Ch. 375; Brownell *v.* De Wolf, 3 Mason, 486; Miles *v.* Boyden, 3 Pick. 216; Bowes *v.* Bowes, 2 B. & P. 500. The rule is stated by Lord *Ellenborough*, in the case of Goodtitle *v.* Meredith, supra, thus: "The effect of the republication is, to give an operation to the codicil by itself, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date." See 7 Johns. 394; Jackson *v.* Potter, 9 id. 312.

[2] 1 Wms. Exrs. 178, 179.

[3] 1 Wms. Exrs. 179–183, and cases cited. The same rule prevailed in Pennsylvania until 1833. *Brackenridge*, J., in Havard *v.* Davis, 2 Binney, 425. And it seems, that even under the statute of 1833, a will may be republished by parol. Jones *v.* Hartley, 2 Whart. 103; Campbell *v.* Jamison, 8 Penn. St. 498. But see Musser *v.* Curry, 3 Wash. C. C. 481. It seems in Ohio, a republication, indorsed upon the will and signed by the witnesses, although not by the * testator, is sufficient. Reynolds *v.* Shirley, 7 Ham. Pt. 2, 39. But in Connecticut, Witter *v.* Mott, 2 Conn. 67, it was held, that a will once revoked, by a written declaration, cannot be republished by parol.

[4] Sir *John Strange*, M. R., in Potter *v.* Potter, 1 Ves. Sen., 437, 442; Vernon *v.*

of the codicil being attached to one of them, is regarded as very effective to show, that the codicil was intended as a republication of that particular one.[5]

4. In a very late case,[6] the Supreme Court of Pennsylvania had this subject under consideration, and after examining the authorities at length came to the conclusion, that the effect of all the English decisions is to make the codicil, proprio vigore, and, independently of any expressed or implied intention to that effect, a republication of the will, and to bring down the will to the date of the codicil, unless a contrary intent be indicated by the instrument with reasonable certainty. We have already alluded to the fact, that if the codicil refers to one of two existing wills by a wrong date, as the *first* of July, 1792, when the date in fact was the *twenty-first*, it appearing from the other circumstances in the case, and the fact that the other will was dated the 18th of July, 1796, that it must have been intended the 21st, it will not defeat the effect of the

Vernon, Com. 381; Jackson *v.* Hurlock, Amb. 487; Doe d. *v.* Davy, 1 Cowp. 158; Barnes *v.* Crowe, 1 Ves. Jr. 486; cases cited ante, n. 1.

[5] Barnes *v.* Crowe, 1 Ves. Jr. 490; Rogers *v.* Pittis, 1 Add. 41. Lord *Camden* said, in Attorney-General *v.* Downing, Ambler, 573, that a codicil does not operate as a republication of a will, unless it is annexed to it, or the contents show the intention. But this case is virtually overruled in Barnes *v.* Crowe, supra; s. c. 4 Brown, C. C. 2.

[6] Neff's Appeal, 48 Penn. St. 501. In this case, the testator made his will in 1850, revoking all former wills. In August, 1857, he made another will, signed, but not attested, by him. In October, 1857, he made a codicil to the first will revoking some of its provisions, and spoke of it as the "foregoing will:" it was held a republication of the first will as of the date of the codicil. And the late English case, Honblon in re. 11 Jur. N. S. 549, where the codicil in terms professed to apply to a will executed in 1848, in which year a draft will had been prepared for the testator's perusal, but had never been executed, but the testator had in fact executed his will in 1854, it was held, that the reference was a mere misdescription, and that the will of 1854, with the codicil, must be admitted to probate. And in the very recent case of Thomson in re, 11 Jur. N. S. 960, the testator executed a will and three codicils, and subsequently executed a fourth codicil, in which he expressly revoked the three former codicils. He afterward executed a fifth codicil in which he confirmed his will and four codicils. It appeared in evidence that the clerk, in copying the draft, wrote "four codicils" for "fourth codicil." The learned judge said, "I think there is sufficient ambiguity on the face of these papers to enable me to admit parol evidence, and from that I am satisfied that the deceased did not intend to revive the three first codicils by the fifth." This decision may be sound, but certainly not upon the ground stated. Parol evidence is never receivable to remove an ambiguity "upon the face of the papers." The learned judge should have been reported as saying, that a sufficient ambiguity

republication.[7] But where it appears, by the terms of the codicil, that it was not intended to operate as a republication of the will, it cannot have that effect.[8] And the natural presumption * is, that a

had been produced by the parol evidence, to allow of evidence as to the testator's intention. Post, §§ 40, 41.

[7] Jansen *v.* Jansen, cited in Pittis *v.* Pittis, 1 Add. 38.

[8] Strathmore *v.* Bowes, 7 Term Rep. 482; s. c. 2 B. & P. 500, 506. See also, Smith *v.* Dearmer, 3 Younge & Jer. 278; Doe *v.* Walker, 12 Mees. & Wels. 591, 599, 601, and Ashley *v.* Waugh, there cited; Hughes *v.* Hosking, 11 Moore, P. C. C. 1. The case of Bowes (Countess of Strathmore) *v.* Bowes in the House of Lords, 2 B. & P. 500, is regarded as a leading case upon the point, that the intent of the testator not to have the codicil produce the effect of a republication, as of the date of the act, shall control the ordinary legal presumption. But it seems to us this very case, in which this rule was first distinctly declared, was decided contrary to the rule upon which it professed to go. Lord *Thurlow*, ex-chancellor, who dissented from the opinion of the judges, to whom the question was referred by the House of Lords, and from the other opinions expressed, went upon the ground that the testator, supposing that his after-acquired lands did pass under his will, made the codicil, for the purpose of changing the trustees, or to pass all his lands, at that date. This seemed the most probable view of the case. But Lord *Eldon* prevailed upon the House, to adopt the view, that every testator is presumed to know the law, and his words and acts are to be construed upon that basis.

1. It seems to be assumed here, as it is everywhere in the books, that the natural effect of a codicil is to bring forward the provisions of the will to which it is intended to attach, to the date of the codicil, and to give them the same operation as if then first declared, and that this effect only fails, when the generality of the operation of the words of the codicil is restrained by reference to specific and limited provisions in the will, which have a narrow and precise application to the time, and existing facts and circumstances, of the date of the will. But the comparatively late case of Doe d. *v.* Walker, 12 M. &. W. 591, in which *Parke*, B., reviews the case of Bowes *v.* Bowes, supra, and the other cases which have followed it, and attempts to distinguish the case before the court from them, seems to us to have adopted substantially the views of Lord *Thurlow*, stated above, and to have gone upon the *apparent* intent of the testator, rather than the *presumed* intent, assuming that the testator comprehended fully the legal force of the words of his will. See also, Lord *Abinger*, in 4 Y. &. C. 166, 167; Langdale *v.* Briggs, 3 Sm. & Gif. 246.

2. And the effect of republication is different, where the devise is general, from what it will be where it is more specific. In the former case, it causes the devise to include every thing which it would if made of the date of the republication. And, as we have seen, a republication of the will, containing a specific devise of real estate, will cause such real estate to pass, notwithstanding, in the intermediate time, it may have been so changed, that, but for the republication, it could not have passed, not being the same precise estate during all the intervening period. Carte *v.* Carte, 3 Atk. 180; Jackson *v.* Hurlock, 2 Eden, 263.

codicil is made, as part of the testator's last will, if there be two in existence at the time, but if one of them have been cancelled or revoked, so as to be no longer in existence, as a valid, operative instrument, the codicil will be presumed to have been intended to form part of the will then in existence and in force.[9]

5. Republication, under the present English statutes, and those of most of the American states, being required to be by some duly executed instrument, subscribed and attested in the same manner in which wills are required to be executed, even the destruction of the revoking instrument will not be sufficient to effect a valid republication.[10] But where the testator, by the codicil, ratifies and confirms his will in all other respects, except wherein it was altered by the codicil, it is the same as if he had made a new will of the date of the codicil, and the whole will then be construed and governed by the law then in force.[11] This is the legal result of any republication of a will,[12] and * consequently, it has been said to revoke, by implication, any other will besides the one republished.[13]

3. But a republication will not extend the operation of the will, in regard to a specific devise, to property not originally intended to be included in it, * although the words might embrace it, since the republication only operates upon the will, as it exists at the date of the republication. It will not, therefore, revive legacies "revoked, adeemed, or satisfied." Lord *Cottenham*, Chancellor, in Powys *v.* Mansfield, 3 My. & Cr. 359, 376, citing Drinkwater *v.* Falconer, 2 Vesey, 623; Monck *v.* Lord Monck, 1 Ball. & B. 298; Booker *v.* Allen, 2 Russ. & My. 270. And his lordship here says: "The case of Roome *v.* Roome, 3 Atk. 181, is not an authority against these decisions." See also, Izard *v.* Hurst, 2 Freem. 224; 3 Eq. Cas. Ab. 769; Cowper *v.* Mantell, 22 Beavan, 223.

4. In regard to powers, it has been held, the republication of the will will not have the effect to include the execution of a power newly acquired, since the date of the will. Holmes *v.* Coghill, 7 Vesey, 499; s. c. 12 id. 206; Jowett *v.* Board, 16 Simons, 352; Walker *v.* Armstrong, 21 Beav. 284. But under the present English statute, a will may be construed as a good execution of a power created during the period intervening between the date of the will and the decease of the testator. Cofield *v.* Pollard, 3 Jur. N. S. 1203; per V. C. *Wood*, in 1 Kay & J. 526, 527. So, it is said, if the will refer expressly to the date of its own execution, or a particular custom then existing, the republication will not change its operation. Doe d. *v.* Hole, 16 Q. B. 848.

[9] Hale *v.* Takelove, 2 Rob. 326; Crosbie *v.* Macdoual, 4 Vesey, 616.

[10] Major *v.* Williams, 3 Curt. 432; 1 Wms. Exrs. 187.

[11] Doe d. York *v.* Walker, 12 M. & W. 591.

[12] 1 Wms. Exrs. 188; ante, n. 8.

[13] 1 Wms. Exrs. 189; Walpole *v.* Orford, 3 Vesey, 402; Walpole *v.* Cholmondeley, 7 T. R. 138.

But as we have said, the republication of a will imports the republication of all the codicils belonging thereto ;[14] yet this will not follow where a contrary intent is deducible from all the testamentary papers.[15]

6. Parol evidence has been sometimes received in the ecclesiastical courts, to show quo animo the testator made a memorandum, republishing his will, and that he did not intend to revoke a codicil, qualifying the will.[16] But generally it has been held, that any alterations made by the testator in his will, before republishing it, are intended to be confirmed by that act.[17] And the republication has the effect to make the words of the will so effectually speak from the date of the republication, that the words will apply to a subject-matter not in existence, at the date of the will, as where a provision is made by the will for testator's son Joseph, who deceased before the execution of the codicil, and the testator had, in the mean time, had another son born, whom he called Joseph.[18] The Lord Chancellor said: "The making of the codicil was a republication of the will, and did amount to a substituting the second Joseph in the place of the first, as if the testator had made his will anew, and had writ it over again." So where one gave a legacy to his wife Sarah, "having no such wife, but after marrieth one of that name," and republishes his will, this is a good bequest.[19]

[14] Crosbie *v.* Macdonal, 4 Vesey, 610.

[15] Grand *v.* Reeve, 11 Simons, 66, 71.

[16] Upfill *v.* Marshall, 3 Curteis, 636; Wade *v.* Nazer, 1 Robert. 627; ante, n. 9.

[17] Neate *v.* Pickard, 2 Notes of Cases, 406.

[18] Perkins *v.* Micklethwaite, 1 Peere Wms. 274.

[19] 1 Wentworth's Off. of Ex. 62. See also, Alford *v.* Earle, 2 Vern. 209; Porter *v.* Smith, 16 Simons, 251; Coppin *v.* Fernyhough, 2 Brown, C. C. 291. So where the testator devised all his land in Aldworth, and afterwards bought other lands in Aldworth, and then executed a codicil attested by three * witnesses, according to the requirements of the statute of frauds, it was held, that the intermediately acquired lands, not being otherwise disposed of by the codicil, passed under the will. Beckford *v.* Parnecott, Cro. Eliz. 493. And in Rowley *v.* Eyton, 2 Mer. 128, where the will devised all the testator's real and personal estate to his son, subject to a charge for the payment of debts; and having subsequently purchased several copyhold estates, devised the same in fee to his son also, by a codicil executed according to the requirements of the statute of frauds, it was held, that the codicil operated as a republication of the will, and made the subsequently acquired estates subject to the charge for the payment of debts. But this case is supposed to have been governed, to some extent, by its peculiar circumstances. 1 Jarman, 180; Sponge *v.* Sponge, 1 Yo. & Jer. 300; s. c. 3 Bligh, N. S. 84; 1 D. & Cl. 365. And the general rule seems to be, that a lapsed legacy will not be

* 7. But it has been held, that the republication of the will of a married woman, by means of a codicil executed after the death of her husband, where the will was made in execution of a power, will only extend to such real estate as is subject to the power.[20]

8. And under the present English statute, where the testator had made alterations in his will which he had not properly authenticated; and where he had made unexecuted papers of a testamentary character after the execution of his will, as where two schedules were referred to in the will, as "*to be* annexed to this document," which could not render such schedules a part * of the will, not being then in existence, it has been held, that the republication of the will, by a codicil duly executed, will give effect to the will as then altered, and render the schedules, although not mentioned in the codicil, a valid portion of the will, as if they had existed at the date of it.[21]

9. It seems to have been left unsettled how far it was competent to grant probate of a will (destroyed by the testator upon making a second will), and revived again by a duly executed codicil. Dr. *Lushington* seemed clear, that the codicil must have the effect to revoke the second will, although it might not have the effect to revive the will so destroyed. And the learned doctor intimated an obiter opinion, that probate could not be granted of the lost will, upon the production of a copy duly verified by the testimony of witnesses.[22] And other cases already referred to take the same view.[23]

revived by republication, so as to go to a different person answering the terms of the will, unless there is something more than the mere act of republication, to show that such was the intention of the testator. Drinkwater *v.* Falconer, 2 Vesey, 623, 626; Doe *v.* Kett, 4 T. R. 592, 601.

The republication will not enlarge the operation of the words of the will. Lane *v.* Wilkins, 10 East, 241. A codicil, properly attested, may have the effect to render valid a devise otherwise void, by reason of the devisee being a witness to the original will. Mooers *v.* White, 6 Johns. Ch. 375.

It was lately decided, in the House of Lords, in the case of Hopwood *v.* Hopwood, 5 Jur. N. S. 897, that although a codicil confirms a will, and for certain purposes brings it down to the date of the codicil, it does not make the will operate, in all respects, as if it had been originally written at that time. Ante, § 28, pl. 39.

[20] Du Hourmelin *v.* Sheldon, 19 Beav. 389.

[*21] Sir *H. J. Fust*, in Skinner *v.* Ogle, 4 Notes Cas. 79; The Goods of Hunt, 2 Robert. 622.

[22] Hale *v.* Takelove, 2 Rob. 318; S. P. in Wharram *v.* Wharram, 10 Jur. N. S. 499.

[23] Ante, § 28, pl. 39, n. 74.

10. It was held, under the former English statute, that where infants made their wills, before they had arrived at a competent age, but expressly approved the same after having arrived at such age, they were thereby rendered valid.[24] So also, persons of unsound mind, having made their wills when not fully competent for such an act, if they republish such wills after being fully restored, there could be no question of their validity, notwithstanding the mere retaining them, without express republication, would not have that effect in either case.[25]

11 The American courts have adopted, in the main, the same rules of construction in regard to the republication of wills, which prevail in the English courts. It has accordingly * been held, in this country, that the act of republication need not be attached to the will to give it legal operation.[26]

12. If the testator was under undue influence, at the time of executing his will, and afterwards, when free from such influence, executes a codicil, it will be regarded as a confirmation and republication of the will.[27]

13. A codicil duly executed, and attached, referring to a paper, which was informally executed as a will, may have the effect of giving operation to the whole, as a will.[28]

14. But the act of republication, to be valid, must be executed with all the solemnities required by statute, and cannot be done by parol merely.[29] An effectual republication brings forward the whole testamentary act to its own date.[30] But the declaration of a married woman, that she desires her property to go, as directed by her will, executed before coverture, is neither the execution of a new will, nor the republication of the old one.[31]

[24] Ante, § 4, pl. 3, and notes.

[25] Swinb. pt. 2, sec. 3, pl. 2.

[26] Van Cortlandt *v.* Kip, 1 Hill, 590; Harvy *v.* Chouteau, 14 Mo. 587; Wickoff's Appeal, 15 Penn. St. 281.

[27] O'Neall *v.* Farr, 1 Rich. 80. But such republication should be narrowly scrutinized.

[28] Beall *v.* Cunningham, 3 B. Mon. 390; ante, § 23 *a*, pl. 6; Harvy *v.* Chouteau, 14 Mo. 587.

[29] Love *v.* Johnston, 12 Ired. 355; contra, 1 Grant's Cas. 75. See Jackson *v.* Holloway, 7 Johns. 394; same *v.* Potter, 9 id. 312; Dunlap *v.* Dunlap, 4 Desaus. 305; Girard *v.* Mayor, 4 Rawle, 323; Battle *v.* Speight, 9 Ired. 288; Cogdell *v.* Cogdell, 3 Desaus. 346.

[30] Murray *v.* Oliver, 6 Ired. Eq. Rep. 55.

[31] Fransen's Will, 26 Penn. St. 202. A codicil is an express republication of all

15. The reëxecution of the testator's will and codicils will have no other effect than a republication. Hence it will not have the effect to revive legacies which have been adeemed or satisfied.[32]

*16. The question, how far the destruction of a later will is to be regarded as having the effect to revive a former one, has been considerably discussed in some of the American courts, and conclusions sometimes arrived at, which do not appear altogether consistent with principle. Where a second or later will is destroyed with the intent to revive an earlier one, there can be no question it should be allowed so to operate. Where the former will is in existence, and is carefully preserved, after the destruction of the later one, there can be little question it was intended to be revived and republished by the act of destroying the later one.

17. But where the former will had been destroyed, or laid aside among waste papers, it will be a very forced and unnatural conclusion, to declare the destruction of a later will to amount to a republication of such lost, destroyed, or abandoned will.[33] The question arose in an early case in Connecticut,[34] and is discussed by an able and learned judge, and the conclusion reached, that where the second will contains an express clause of revocation, and is subsequently destroyed by the testator, leaving the former will uncancelled, and in the same state it was before the execution of the later one, that this did not operate as the republication of the first will. This point is here argued by *Hosmer*, Chief Justice, with a considerable degree of plausibility, and some early cases cited as favoring the view maintained, but we cannot regard the conclusion as entirely satisfactory. The better opinion is, that which we have already intimated,[33] that the effect of the destruction of a later will depends upon the facts and circumstances of each * particular case, to be judged of by the jury, under proper instructions in regard to the law applicable to the special circumstances of each case.[33]

18. It seems to be clear, that so long as the act of revocation of

the will, not inconsistent with the codicil, ante, pl. 4. Simmons *v.* Simmons, 26 Barb. 68.

[32] Langdon *v.* Astor's Executors, 16 N.Y. Ct. App. 9.

[33] Ante, § 25, pl. 36 and notes.

[34] James *v.* Marvin, 3 Conn. 576. Upon the question of receiving parol evidence of the intention of the testator to revive a former will, by the destruction or revocation of a later one, or to die intestate, the case of Boudinot *v.* Bradford, 2 Dallas (Penn.), 266 may be consulted. See also, Lawson *v.* Morrison, id. 286; ante, § 25, pl. 45.

the later will is inchoate and imperfect, the former will is not revived.[35] And the cases are not uniform in regard to the admission of parol proof of facts and circumstances to show the intent with which a later will was destroyed by the testator.[36] In this case it was held, that the cancellation of a later will, which had revoked a former one by implication, leaves the former one in full force, if it be retained by the testator until his death uncancelled, and the effect of such cancellation cannot be rebutted by evidence of the conveyance of part of the property mentioned in the former will; nor by evidence of reconciliation with certain members of the testator's family, whom he had disinherited by such former will; nor by evidence of the death of one of the trustees named in such will, before the cancellation of the later one; nor by proof of the testator's declarations subsequent to such cancellation, which are inconsistent with an intent to revive the former will; nor by proof that the testator made a will subsequent to such cancellation, inconsistent with the first will, but which did not contain apt words to pass real estate. It has recently been decided in Georgia, that the cancellation of a later will does not operate to revive a former one.[37]

19. The obliteration of an exception to a general clause, * with the view to leave the general clause operative in the will, cannot have that effect, without a republication, which is equivalent to a new devise.[38]

20. And where the testator, having two wills, destroyed one of them, and preserved the other, a question arising, whether the one destroyed was the one which the testator intended, it was held, that proof, or disproof, of the intention of the testator, in regard to the particular one intended to be destroyed, did not require the testimony of the same number of witnesses as the statute requires to the authentication of a will, but it may be shown by a single witness.[39]

[*35] Means *v.* Moore, Harper, 314.

[36] Flintham *v.* Bradford, 10 Penn. St. 82. The question of parol republication of wills under the different statutes in this state, seems to have presented an inquiry of considerable uncertainty and controversy, extending to a disagreement among the different members of the Supreme Court, at different periods. The course of decision is presented in the late case of Gable's Executors *v.* Daub, 40 Penn. St. 217, by which it would seem, that parol republications have been held valid there, unless prohibited by some recent statute.

[37] Lively *v.* Harwell, 29 Ga. 509.

[*38] Pringle *v.* M'Pherson, 2 Brevard, 279.

[39] Burns *v.* Burns, 4 S. & R. 295.

21. The will of a married woman is not rendered valid, under the present English statute, if executed during coverture, by reason of the testatrix surviving her husband, there being no confirmation or republication of the same after the determination of the coverture.[40] A will can only be republished in the particular mode pointed out in the statute, and not by parol under the present English statute.[41]

[40] Wollaston in re, 12 W. Rep. 18.

[41] Dickinson *v.* Swatman, 6 Jur. N. S. 831.

*CHAPTER IX.

CONSTRUCTION OF WILLS.

SECTION I.

FROM WHAT TIME THE WILL IS REGARDED AS SPEAKING.

1. The nature of the act refers its language to the period when it comes in force.
2 and n. 2. That is the prevailing rule now, both here and in England.
3 and n. 4. Language referring expressly to the present time must receive that construction.
4. But, many times, words in the present tense refer to the time of testator's decease.
5. Provisions in regard to the payment of debts will be so construed.
6. So also words defining the disposition of the residuum of an estate.
7. Specific gifts of stock, or other personalty, have reference to the date of the will.
8. The same rule of construction obtains in regard to the objects of testator's bounty.
9. Devise or bequest to relative, if in existence, is personal; otherwise not.
10. Provision for servants is limited to those who are alive at the date of the will.
11. General devises, and bequests, include all which testator can give at the time.
12. The same rule of construction extended to classes of persons. All answering the description, at death of testator, take.
13. Devise of all testator's estate in particular place.
14. General powers of appointment, executed, by prior will, but not so of revocation.
15 and n. 30. After-acquired real estate not devisable, except by statutory provisions.

WHAT ESTATES ARE DEVISABLE.

16. All estates where there is any present interests are devisable.
17. All vested interests, whether liable to be defeated by future contingencies or not, are devisable.
*18. This rule is recognized as existing in Massachusetts by Wilde, J., and as extending to contingent remainders and executory devises.
n. 31. Blackstone's and Kent's comments upon the same question.
19. Estates of which the testator has been disseized, devisable.
20. The construction under the present English statute.
21. Bequest to "heirs at law" means such as are heirs at decease of testator.

§ 30. 1. THE very nature of the testamentary act, which is expected to take effect only at the time of the decease of the testator, presup-

poses, that so far as facts and circumstances are susceptible of anticipation by him, so as to enable him to place himself in the position he will then be, relatively to his property and his obligations to his family, that he will have used the language of his will, with reference more particularly to that period.[1]

2. In the case last referred to, in both of which the opinions were delivered by Mr. Justice *Ellsworth*, the subject is presented in a very clear light. In the first of these cases, the learned judge said: "A will speaks from the death of the testator, and not from its date, unless its language, by fair construction, indicates the contrary intention." "Hence a devise of personal property generally carries all the testator had at the time of his death." And it may be added, the same rule now prevails generally in this country as to real estate.[2]

* 3. The exceptions to the general rule thus defined, as in most cases, will be the most difficult of determination. And here we prefer to use the language of that experienced magistrate from whom we have already quoted:[3] "Whenever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word 'now.' Thus, to the descendants now living of a person, means those living at the date of the will."[4]

*[1] Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, 21 Conn. 616.

[2] It has been already stated, that the present English statute expressly declares, that the language of wills shall be construed as of the date of the decease of the testator, unless the contrary appear to have been the intention of the testator, and that the will shall operate upon all the estate of the testator, real and personal, at the time of his decease, so far as its terms are applicable, or unless the intention of the testator appear to have been otherwise. And this rule, which is but the embodiment, in the statute, of the general sense of all minds upon the subject, has generally been adopted in the American states, either by statute or construction. The rule in the English courts is thus declared in the late cases. The general presumption is, that the testator expects the words of his will to speak from his death. A different construction will not therefore be admitted, unless very obviously intended. Goodlad *v.* Burnett, 1 Kay & Johns. 341; Bullock *v.* Bennett, id. 315.

*[3] Gold *v.* Judson, 21 Conn. 616, 622.

[4] Crossly *v.* Clare, Amb. 397; Allsoul's College *v.* Coddrington, 1 Peere Wms. 597. Here the testator gave a library of books, now in the custody of B., to the college, and afterwards buys more books, which he places in the same library, and it was held, the after-bought books did pass under the bequest. See also, Abney

*4. But there are many cases where language, in the present tense, must be applied to the period of the decease of the testator, as in the case of a will, of all the property of which "I am possessed," or "all I am possessed of."[5]

5. And provisions in the will, in regard to the payment of the testator's debts, have been generally construed as having reference to the period of the testator's death, and the words, "all the debts I *have* contracted," it has been held, must be construed, "shall contract."[6]

6. And language, naturally defining the present residuum of an estate, has generally been held to pass the residuum, at the date of the testator's decease,[7] as where it is said in the will, "I may have forgot many things, such as money due me from government, &c., if such there is, it is to be thrown into the lump for the benefit of the legatees." Lord Chancellor *Eldon* here said: "The courts have held,

v. Miller, 2 Atk. 593, 597; Blundell *v.* Dunn, cited in 1 Mad. 433; Attorney-General *v.* Bury, 1 Eq. Ca. Ab. 201, pl. 12; Rowland *v.* Gorsuch, 2 Cox, 187; James *v.* Richardson, 1 T. Jones, 99; 1 Eq. Ca. Ab. 214, pl. 11.

The same principles are maintained in Cole *v.* Scott, 16 Simons, 259, 1 McN. & Gord. 518. See also, Douglas *v.* Douglas, Kay, 400; Hepburn *v.* Skirving, 4 Jur. N. S. 651; Goodfellow *v.* Goodfellow, 18 Beav. 361. In the case of Cole *v.* Scott, Lord Chancellor *Cottenham* said, when the case was before him on appeal, with reference to the use of the word "now," in the description of the estate devised: "It appears to me just the same as if the testator had said, 'All the freehold and leasehold estates of which I am, on this 29th day of April, 1843, seized and entitled.' If these had been the words, there could not, of course, have been a doubt; but the words used are in effect the same." But his lordship says, if the will had had no date, the word "now" must have been referred to the death of the testator. But these views have not been regarded as entirely satisfactory, even under the English statute, 1 Vict. ch. 26, and they would be less so, under the more general provisions of the statutes of most of the American states. To avoid all subsequent questions, as suggested by Mr. Jarman, if the testator desires to limit the operation of a bequest to the time of making, he should adopt some unequivocal form of expression, having reference, in terms, to the date of the will, since all mere general forms of expression, naturally keep pace with the ambulatory character of the instrument, and are just as applicable, at the time of the decease of the testator, and in some respect more so, than at any antecedent period.

*[5] Wilde *v.* Holtzmeyer, 5 Vesey, 811, 816.

[6] Bridgman *v.* Dove, 3 Atk. 201.

[7] Bland *v.* Lamb, 2 J. & W. 399, 403. Provisions in regard to children, whether of the testator or another, although expressed in the present tense, have generally been construed, to include those born after the date of the will, and so the expression, "child he hath by his wife," has been held to include those antecedently in existence. Ringrove *v.* Bramam, 2 Cox, 384; 1 Jarman, 300.

whether on satisfactory grounds or not, is another question, that where a person gives all his property, it shows that he did not mean to die intestate, and not meaning to die intestate, as to what he had at the time of making his will, they have inferred that he did not mean to die intestate, as to what he should have at the time of his death. This rule has sometimes operated with great hardship, and directly contrary to the intention of the party; but notwithstanding that, it has been allowed to prevail."

7. Specific gifts, whether of stock or other personal estate, have been construed to have reference to the property of the testator, then in existence, and if the testator dispose of the article described, either in whole or in part, and subsequently * acquire more of the same description, the legacy will nevertheless fail, as to all except the portion not disposed of.[8] But general legacies of a particular description, as a certain number of shares of a particular stock, do not in this respect follow the same rule in regard to change of the estate, as specific legacies.[9] And we have already seen that renewals of leasehold estates do not pass under a specific devise of the former leasehold interest, it being regarded as altogether a distinct estate.[10] But a devise of leaseholds, "for all the residue of the term and interest, I shall have to come therein, at my decease," has been held to include the right of renewal.[11] And so long as the equitable title to the leasehold interest remains in the testator, at

[8] Cockran *v.* Cockran, 14 Simons, 248; Hayes *v.* Hayes, 1 Keen. 97; Wood, V. C., in Goodland *v.* Burnett, 5 Kay & J. 347; Wheeler *v.* Thomas, 7 Jur. N. S., 599.

[9] Robinson *v.* Addison, 2 Beav. 515.

[10] Rudstone *v.* Anderson, 2 Ves. Sen. 418; Hone *v.* Medcraft, 1 Br. C. C. 261; Coppin *v.* Fernyhough, 2 Br. C. C. 291. But very slight circumstances will be seized hold of by courts, to give an equitable construction to such specific bequests, as where the property is given in trust, it has been held to include the right of renewal of the lease. Carte *v.* Carte, 3 Atk. 174. And the same principle has been extended to the case of a lease, with covenant for perpetual renewal. Poole *v.* Coates, 2 D. & War. 493; 1 Jarman, 301.

[11] James *v.* Dean, 11 Vesey, 383; 15 Vesey, 236; Churchman *v.* Ireland, 1 Russ. & My. 250. In this case, Lord *Brougham*, Chancellor, held, that even under the statute of wills, and the statute of frauds, anterior to the present English statute of wills, a devise and bequest of "all my estate and effects both real and personal, which I shall die possessed of," extends to land purchased by the testator, after the date of the will; and this case virtually overrules that of Back *v.* Kett, Jac. 534. But it is not so declared, by his Lordship, in terms.

the time of his decease, it will pass under the will, notwithstanding the legal estate may have been transferred.[12]

8. The same rule of construction, as to words used in wills, descriptive of the objects of the testator's bounty, has generally prevailed, although with considerable hesitation, in many * instances, and with very essential qualifications.[13] It seems to have been supposed by some, that a devise or bequest, to "my son," or other relation by class, will only apply to the person, or persons, answering that description, at the date of the will.[14] But it is obvious this proposition must be received with some allowance. By the present English statute, the will is revoked by a subsequent marriage of the testator,[15] and that question cannot now, often, arise in the English courts, in regard to that relation. But under the old law, a bequest by the husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual, who answers the description, at the date of the will, and is not to be extended to an after-taken wife.[16] And it is laid down in the early books, that if the relation is changed before the decease of the testator, as where a bequest is made to the husband, or wife, of a particular person, and the person marries again before the decease of the testator, he or she will, nevertheless, take the bequest,[17] although not the wife or husband of the person named in the will, at the time it becomes operative. And it seems to have been considered in a recent case, that a devise, or bequest, to the wife of a person named, * he having no wife at the

[12] Woodhouse *v.* Okill, 8 Simons. 115.

[13] Foster *v.* Cook, 3 Br. C. C. 347. This case is often quoted in support of the general proposition stated in the text, which, to a certain extent, it supports. But the opinion of the Lord Chancellor, p. 349, in note, shows very clearly, that the gift over in the event of the decease of the legatee, was the controlling circumstances in the case, why *another* legatee, answering the description at the *decease* of the testator, could not take.

[14] 1 Jarman, 303.

[15] See Pratt *v.* Mathew, 22 Beavan, 334.

[16] Garratt *v.* Niblock, 1 Russ. & My. 629; Bryan's Trust. 2 Simons, N. S. 103.

[17] 10 Mod. 371, arguendo; Plow. 344; Vin. Ab. Tit. Devise, T. b. pl. 2; Godolph. 462. But Mr. Jarman, vol. 1, p. 304, says: "If J. S. had no wife at the date of the will, a devise to the wife of J. S. might go to the person answering that description, at the decease of the testator, but that it is clear, the person must answer the description, either at the time of the decease, or of the date of the will, and merely having sustained it, during some portion of the intervening period, will not entitle such person to the bequest. Ante, § 29, pl. 6 and note.

date of the will, shall go to his wife at the decease of the testator.[18] And it seems to us, this must be the general construction of a devise, or bequest, to any relative, either of the testator, or a third person, that if no person answering the description exists at the date of the will, the devise, or bequest, will go to the person answering that description, at the decease of the testator, if any such there be.

9. The general rule, then, which we deduce from the cases upon this point is, that if a devise, or bequest, is made to one sustaining a particular relation, and there is such a person in being at the date of the will, it shall be held to be descriptive of that person; but if there be no such person at the time, then the language shall be construed, as descriptive of the relation, and any one answering it, at the decease of the testator, will take under it. And the cases seem to favor this view as a general proposition, in regard to estates given in remainder.[19] But where there is a person in existence, answering the description at the date of the will, and the same person survives the testator, it seems impossible to extend the provision to another person, subsequently coming into the same relation.[20] The learned Vice Chancellor, Sir *James Wigram*, here confesses, that if the question were submitted to a person not bound by "legal rules of construction," whether a provision for the maintenance of the wife and children of A. B., after his decease, should go to the wife of A. B., although not the same person who sustained that * relation, either at the date of the will, or the decease of the testator, such person would find difficulty in believing, that the intention of the testator could be carried into effect, short of allowing such alimentary stipend to go to the wife, who should happen to survive. The learned judge, however, concludes: "The question which I have to consider is, whether the will gives it to her or not, and it is with regret I have come to the conclusion, that the will does not give it to her."

* [18] Lloyd *v.* Davies, 14 C. B. 76.

[19] Frank *v.* Frank, 3 M. & Sel. 25. But a more stringent construction is sometimes adopted, in order to save a lapse. Peppin *v.* Bickford, 3 Vesey, 570.

[20] Boreham *v.* Bignall, 8 Hare, 131. Where the testator had been separated from his lawful wife, whose name was Elizabeth, and had subsequently gone through a marriage ceremony with another woman, by the name of Sarah, and, at the time of his death, she was cohabiting with him as his wife, a bequest in his will of the income of his property to "his wife, Sarah," for life, was held not to belong to the lawful wife, but to the other woman, Sarah. Dilley *v.* Mathews, 8 Law Times, N. S. 762, before Vice Chancellor *Wood*.

10. And this construction has been carried so far, as to restrain a provision for the testator's servants, to those in his employment, at the date of the will, although subsequently superseded by others.[21]

11. General devises and bequests seem to have been universally construed to include all which it was in the power of the testator to dispose of, which, as the law now stands, in most of the American states, will embrace all the testator's estate, whether real or personal, at the time of his decease.[22]

* 12. And the same rule of construction has been extended to devises, and bequests, to classes, or fluctuating bodies of persons; all answering the description, at the decease of the testator, have been held entitled to take.[23]

* [21] Parker *v.* Marchant, 1 You. & C. C. C. 290. But this seems to us a very questionable construction, and one which ought not to be followed, unless there is something in the will to justify the conclusion that the provision was intended to be personal rather than for the class of persons named. A provision for servants, more than most others, would naturally be supposed to have reference to those who should be thrown out of employment by the decease of the testator.

[22] 1 Eq. Cas. Ab. 201, pl. 12; Banks *v.* Thornton, 11 Hare, 176; Brimmer *v.* Sohier, 1 Cush. 118; Wait *v.* Belding, 24 Pick. 129, 136; Loveren *v.* Lamprey, 2 Foster, 434; Collin *v.* Collin, 1 Barb. Ch. 630; Van Vechten *v.* Van Veghten, 8 Paige, 104. It is here said, that to take a case out of this rule there must be something in the nature of the subject of the bequest, or in the language used, to show an intent to confine the gift to the subject, as it existed at the date of the will. It was held, in Valentine's Succession, 12 Louis. Ann. 286, that a disposition, which, in terms, does not define the time to which it refers, must be referred to the time of making the will. A bequest of personalty, to be equally divided "between all my children that are now living," was held to create an interest in the children of a son of the testator, who deceased after the making of the will, but in the lifetime of the testator, and that such children took the share provided for their father, as purchasers. Whitehead *v.* Lassiter, 4 Jones, Eq. 79.

[23] 1 Jarman, 306, 307. In Campbell *v.* Rawdon, 18 N. Y. 412, it is said, a devise to a class of persons takes effect in favor of those who constitute the class, at the death of the testator, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts, as may be entitled to consideration in construing its provisions. But where there is an intermediate estate, the class is to be determined at the time the estate vests in such class, in possession. Knight *v.* Knight, 3 Jones, Eq. 167.

And the use of the word "then" with reference to the vesting or coming into possession of the estate over, will not render it imperative that the members of the class shall be ascertained at the termination of the intermediate estate. Bullock *v.* Downes, 9 House Lds. Cas. 1. The word "then" is sometimes used as an adverb of time, and sometimes as pointing to an event, and nearly synonymous

13. Under statutes giving the testator power to dispose of all his estate, both real and personal, of which he may be possessed at his decease, it has been held, that a general devise of all the testator's estate in a particular town, or county, or other place, will embrace all of which he dies possessed, within these limits.[24]

14. General powers of appointment, created after the date of the will, will be executed by the will, under the present English and similar statutes, if it would have had that operation, provided such powers had been in existence, at the date of the will.[25] But in regard to powers of revocation, reserved by testator, the rule of construction is otherwise ;[26] and an existing * will cannot be regarded as intended to operate upon them, when reserved after the making of the will.[27]

15. It was, as before stated,[28] an established rule of the English law, until the recent statute,[29] that to give effect to a devise of real estate, the testator must not only be actually seized of the estate, at the time of his death, which rule still prevails, everywhere, but he must have been seized of the same estate, at the time of making the devise, and also during all the intervening period.[30]

with " afterwards ; " and it is sometimes used in both these senses in the same sentence. Gill. *v.* Barrett, 29 Beav. 372. And, where the estate is contingent until the determination of an intermediate estate, the persons entitled cannot be ascertained until that event; and if the estate is directed to be distributed among the surviving children of the devisee of the intermediate estate, at the termination of such estate, " according to law," this will be construed to mean, " the law " at the time of distribution, and not at the date of the will, where it is different. Van Tilburgh *v.* Hollinshead, 1 McCarter, 32. And a devise made dependent upon the decease of an intermediate devisor, where both are expressed in fee simple, will be regarded as substitutional, and intended to take effect only in the event of the first devisor dying in the lifetime of the testator. Briggs *v.* Shaw, 9 Allen, 516. The point is very happily illustrated by Mr. Justice *Gray*, in the case last cited, referring to Cambridge *v.* Rous, 8 Ves. 12, 21 ; Home *v.* Pillans, 2 My. & K. 15, 20, 21.

[24] 1 Jarman, 307 ; O'Toole *v.* Brown, 3 Ell. & Bl. 572 ; Lady Langdale *v.* Briggs, 3 Sm. & Gif. 246 ; Doe d. *v.* Walker, 12 M. & W. 591.

[25] Stillman *v.* Weedon, 16 Simons, 26 ; Carte *v.* Carte, 3 Atk. 174 ; Cofield *v.* Pollard, 3 Jur. N. S. 1203.

[26] Pomfret *v.* Perring, 5 De G. M., & G. 775 ; Palmer *v.* Newell, 20 Beav. 38 ; Re Merritt, 4 Jur. N. S. 1192.

[27] 1 Jarman, 313. See Leigh *v.* Norbury, 13 Vesey, 340.

[28] Ante, § 26.

[29] 1 Vict. ch. 26.

[30] Bro. Ab. tit. Devise, pt. 15 ; Rol. Ab. 615, pl. 6 ; 2, pl. 1 ; Minuse *v.* Cox, 5 Johns. Ch. 441, 450.

This rule of the English law went upon the theory of considering the devise as a species of conveyance, which required the present seizin of the testator to the validity of the conveyance, and the further implication, that the conveyance of the title, even for an instant, operated as a revocation of the devise, and it could not therefore become operative, except by the republication of the will. This same rule of construction obtained in most of the American states, until a comparatively recent period. That was the inflexible rule in Massachusetts, until the date of the Revised Statutes.[31] So that the will, as * to devises of real estate, was considered as speaking from its date.

[31] *Parker*, Ch. J., Bullard *v.* Carter, 5 Pick. 112, 114; ante, § 26, pl. 11, et seq.; Gen. Stats. c. 92, § 4. An additional reason is here assigned by the learned judge for this rule, namely, the interest which the law always takes in heirs. The Massachusetts statute provides, that all after-acquired interests in real estate shall pass by the will, whenever "such clearly and manifestly appears by the will to have been the intention of the testator." And it is assumed, as the natural intendment, from the very act of one making a will, which purports upon its face to dispose of all his estate, real and personal, and which from the very nature of the act may fairly be presumed to have been his intention; and which he expects to come into operation only at the time of his death, that he designs it to operate upon all estate, both real and personal, of which he dies possessed. This is putting real and personal estate much upon the same footing. *Wilde*, J., in Prescott *v.* Prescott, 7 Met. 141, 146. This provision of the Massachusetts statute is held to apply to wills, made before it came in force; and that where it appears, on the face of the will, that the purpose of the testator was not to die intestate as to any portion of his estate, it will be presumed this intention still exists, where the testator afterwards purchases real estate. Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterson, 12 Met. 262; Blaney *v.* Blaney, 1 Cush. 107, 116, where it is said by *Metcalf*, J., that the English rule, that a devise of real estate is to be regarded as specific, is destroyed by the statute enabling the testator to dispose of all lands of which he may die seized. See also, Winchester *v.* Foster, 3 Cush. 366, where *Shaw*, Ch. J., lays down the rule, that in every case where there is nothing in the will to indicate an intention to limit its operation, short of including all his property, real and personal, at his death, it may fairly be presumed such was the intention of the testator, because such is the prima facie object and purpose of a will. The old rule upon this subject prevailed in Pennsylvania until 1833. Girard's Heirs *v.* Philadelphia, 2 Wallace, Jr. C. C. 305. It has been modified in Maine, Carter *v.* Thomas, 4 Greenl. 341; and in Connecticut, Brewster *v.* M'Call, 15 Conn. 274; and in North Carolina, Foster *v.* Craige, 3 Iredell, 536. In New Hampshire, Whittemore *v.* Bean, 6 N. H. 47, it is declared unreasonable. The rule existed, until the late revision of the statutes, in New York. Vol. 2, 57, §§ 2, 5. The rule in Virginia seems to have long been placed on the same basis, as by the Mass. Rev. Stats., that real estate acquired after the date of the will shall pass, where such appears to be the inten-

WHAT ESTATES ARE DEVISABLE.

16. The rule of the English law in regard to what interests in land are devisable, seems finally to have settled down upon the same basis as that of inheritance, or assignment. All estates which are transmissible, either by operation of law, or by the act of the owner, are held devisable. This, it has long been held, extends to a possibility, if it be not a mere naked expectancy, but be coupled with an interest. Estates resting upon a double contingency, as a possibility upon a possibility, are regarded as too indefinite to be transmissible,[32] such as the * expectancy of

tion of the testator. Turpin *v.* Turpin, 1 Wash. 75; Hyer *v.* Shobe, 2 Munf. 200. It seems to be the rule in most of the American states, where the testator is allowed to devise all his after-acquired real estate up to the time of his decease, to give all general provisions of the will that effect, the same as is done in regard to personalty. McNaughton *v.* McNaughton, 41 Barb. 50; Pruden *v.* Pruden, 14 Ohio, N. S. 251.

[32] 2 Black. Comm. 290 and notes. The rule is thus stated by the learned author: "*Contingencies* and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it has been said) be assigned to a stranger unless coupled with some present interest." Shep. Touchstone, 238, 239, 322; 11 Mod. 152; 1 P. Wms. 574; Strange, 132, to which Mr. Chitty and Mr. Sharswood have appended the following notes, showing very clearly that any interest which is transmissible by descent or devise is ordinarily assignable.

"It is now well established as a general rule, that possibilities (not meaning thereby mere hopes of succession, Carleton *v.* Leighton, 3 Meriv. 671; Jones *v.* Roe, 3 T. R. 93, 96), are devisable; for a disposition of equitable interests in land, though not good at law, may be sustained in equity. Perry *v.* Phelips, 1 Ves. Jr. 254; Scawen *v.* Blunt, 7 Vesey, 300; Moor *v.* Hawkins, 2 Eden, 343. But the generality of the doctrine that every equitable interest is devisable, requires, at least, one exception: the devisee of a copyhold must be considered as having an equitable interest therein; but it has been decided that he cannot devise the same before he has been admitted. Wainwright *v.* Elwell, 1 Mad. 627.

"So, under a devise to two persons, or to the survivor of them, and the estate to be disposed of by the survivor by will, as he should think fit, it was held, that the devisees took as tenants in common for life, with a contingent remainder in fee to the survivor, but that such contingent remainder was not devisable by a will made by one of the tenants in common in the lifetime of both. Doe *v.* Tomkinson, 2 Man. & Sel. 170." — *Chitty.*

"Mr. Ritso remarks, that, independently of thus confounding contingencies and mere possibilities, as if they were in pari ratione, which they certainly are not, — there is here a great mistake; first, in describing mere possibilities to be such as may be released or devised by will, &c.; and, secondly, in supposing devisable possibilities to be incapable of being assigned to a stranger. For, in the first

an heir, and other such remote contingencies, where there cannot properly be said to exist any present interest.

*17. It seems to be settled beyond all question, that all vested estates, even though liable to be defeated by conditions subsequent, are transmissible, and, by consequence, devisable. This was settled at a very early day.[33] *Parker*, Chancellor, here said: "The court were of opinion this possibility would go to the ex-

place, there is this wide difference between contingencies (which import a present interest, of which the future enjoyment is contingent), and mere possibilities (which import no such present interest), namely, that the former may be released in certain cases, and are generally descendible and devisable, but not so the latter. Suppose, for instance, lands are limited (by executory devise) to A in fee, but if A should die before the age of twenty-one, then to C in fee: this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a present interest, although the enjoyment of it is future and contingent. But where there is no such present interest as the hope of succession which the heir has from his ancestor in general, this, being but a mere or naked possibility, cannot be released or devised, &c. Fearne, 366.

"Secondly, contingencies or possibilities which may be released or devised, &c., are also assignable in equity, upon the same principle; for an assignment operates by way of agreement or contract, which the court considers as the engagement of the one to transfer and make good a right and interest to the other. As where A possessed of a term of 1,000 years, devised it to B for fifty years, if she should so long live, and after her decease to C, and died; and afterwards C assigned to D. Now this was a good assignment, although the assignment of a possibility to a stranger. The same point was determined, in the case of Theobald *v.* Duffay, in the House of Lords, March, 1729–1730. Ritso, Introd. 48." — *Sharswood.*

4 Kent, Comm. 206, 207; The Mayor of London *v.* Alford. Cro. Car. 576; 2 Co. 51. The Rev. Stats. N.Y. vol. 1, p. 724, declare that no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect. The rule as to the devisable character of estates is thus stated, 4 Comm. 261, by Chancellor Kent: "All contingent and executory interests are assignable in equity; and will be enforced, if made for a valuable consideration; and it is settled, that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable." Whitfield *v.* Fausset, 1 Vesey, 391; Wright *v.* Wright, ibid. 411; Lawrence *v.* Bayard, 7 Paige, 76; Varick *v.* Edwards, 1 Hoff. Ch. 383, 395–405; Pond *v.* Bough, 10 Paige, 141. If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised or descend at the common law. Lampet's Case, 10 Co. Rep. 46; Roe *v.* Jones, 1 Hen. Bl. 30; Roe *v.* Griffiths, 1 W. Bl. 605; Jackson *v.* Waldron, 13 Wendell, 178; 1 Ired. 570; Co. Litt. 446; 4 Wash. C. C. 570; 1 Pet. (U. S.), 193, 213; 4 Hill, 635.

[33] Pinbury *v.* Elkin, 1 P. Wms. 563, 566.

ecutors of the legatee." "The cases in Swinburne which seemed to import the contrary, Swinb. 461, 462, were so darkly put, * and with so many inconsistencies, as to be all overbalanced by the opinion of Lord *Nottingham*," [34] where a man devised £100 to A at the age of twenty-one years, and if A died under age, to B. B died in the lifetime of A, and afterwards A died under age, and it was held, the executors of B should have the £100.

18. This rule is recognized, as existing in the state of Massachusetts, to the fullest extent, by *Wilde*, J.,[35] where the English cases are quoted and discussed by the learned judge, and the rule thus stated: the court held,[36] clearly, that executory devises were transmissible and devisable, that they were not mere possibilities, but in the nature of contingent remainders; and that there was no doubt such estates were transmissible, and consequently devisable; and Lord *Kenyon* says, in the close of his opinion, in Jones *v.* Roe, "I sincerely hope that this point will now be understood to be perfectly at rest." This seems to show very clearly, that, according to the English law, as reviewed by the learned judge, and adopted by the court, even contingent remainders, and executory devises, may be regarded, as so far of the nature of vested interests, as to become transmissible and devisable, provided the contingency upon which the estate depends shall finally turn up in its favor, notwithstanding the testator may have deceased before the estate became absolute in him.[37]

19. It is clear that at law, estates of which the grantor has been disseized are not, in a strict, technical sense, assignable. The assignment of such estates was held to partake of the nature of maintenance. But as, in equity, the estate passes, it may always be pursued, in the name of the assignor. And all such rights of entry will clearly pass by way of descent, there being a transmission of the title by operation of law, which is * not regarded as within the mischief of the rule, by which the voluntary assignment of such interests is restrained. And by parity of reason, it would seem that such estates are devisable. In some of the states there are special statutes upon the subject, making estates of which the devisor has been disseized devisable.[38]

* [34] Anonymous, 2 Vent. 347.

[35] Winslow *v.* Goodwin, 7 Met. 363.

[36] Jones *v.* Roe, 3 T. R. 88.

[37] We shall have occasion to recur to this subject hereafter. Post, pt. 2, § 64.

* [38] Gen. Stats. Mass. ch. 92, § 3; Humes *v.* M'Farlane, 4 Serg. & R. 435. A will

20. In a late English case,[39] it was held, that under the present English statute, which declares that wills shall be construed as if speaking from the time of the decease of the testator, unless a contrary intention appear in the will itself, that such intention must be presumed, whenever it becomes impracticable to give the provisions of the instrument a sensible meaning, except with reference to the time of the date, and the facts and circumstances then existing. And under the same statute, a devise of "the use of the house I now live in, and all its furniture, free of rent," during life, must be construed as having reference to the house, as occupied by the testatrix at the date of the will, and not to the house as occupied at the time of her decease.[40]

21. And the devise or bequest of property to the testator's heirs at law, means those who are such at the time of his decease,[41] unless a contrary intent is very obvious. Mere conjecture, or surmise, is not sufficient. But where there are * intervening estates, and the

may operate upon a contingent reversionary interest. Brigham *v.* Shattuck, 10 Pick. 306; Austin *v.* Cambridgeport, 21 Pick. 215. But a mere wrongdoer, who is only seized of an estate, tortiously, cannot transmit any interest by way of devise. Smith *v.* Bryan, 12 Iredell, 11. A reversion, expectant upon the determination of an estate tail, is devisable. Steel *v.* Cosk, 1 Met. 281. A person who has sold an estate under circumstances entitling him to have the contract set aside, in a court of equity, has a devisable interest. Gresley *v.* Mousley, 4 De Gex & J. 78; s. c. 5 Jur. N. S. 583.

[39] Wheeler *v.* Thomas, 7 Jur. N. S. 599.

[40] Williams *v.* Owen, 9 Law T. N. S. 200.

[41] Doe *v.* Lawson, 3 East, 278; Bird *v.* Lurkie, 8 Hare, 301; Philps *v.* Evans, 4 De G. & Sm. 188; Abbott *v.* Bradstreet, 3 Allen (Mass.), 587; Smith *v.* Harrington, 4 id. 566. And in case of the disposition of real and personal estate, by will, to the "heirs at law," or "the lawful heirs" of any person, the terms will receive their common-law construction, and not be held to embrace such persons as would be entitled to a distributive share of personalty. Lombard *v.* Boyden, 5 Allen, 249; Loring *v.* Thorndike, id. 257. But a bequest "to children and their heirs respectively, to be divided in equal shares between them," has been held to embrace, under the term "heirs," the children of deceased children. Bond's Appeal, 31 Conn. 183. And the word "heirs," with reference to personalty, often receives the construction of "next of kin." Scudder *v.* Vanandale, 2 Beasley, 109. And in one case the word "issue," in a will, was held not a technical word of limitation, but to be so applied as to reach the probable intent of the testator. M'Pherson *v.* Snowden, 19 Md., 197. But in other states the word "heirs," as already intimated, is restricted to its more technical import, even when used in such a connection that it might naturally have received a more extended application. Porter's Appeal, 45 Penn. St. 201. This question is more fully considered in the second part of this work, § 46.

remainder is contingent, it will be construed as having reference to those who shall sustain the relation of heirs at the time the estate vests in possession.[42] But the fact, that the persons to whom the estate for life is given are among such heirs, is no sufficient ground to vary the general construction.[43]

SECTION II.

FOREIGN DOMICIL. BY WHAT LAW THE VALIDITY OF A WILL GOVERNED.

1. The place of domicil determines the law of succession to personal estate.
2. Where the courts of the domicil have decided the question, it is conclusive on all courts.
3. The difficulty of fixing any other rule, stated and illustrated.
4. The authorities quoted and commented upon.
5. The comments of Lord Chancellor Westbury on the question.
6. The final conclusion of Sir Cresswell Cresswell.

n. 1. The embarrassments in the way of obtaining clear knowledge in regard to foreign law. The English statute.

7. Lord Chelmsford's views. The probate held conclusive of the validity of the will.
8. The devise and the descent of real estate governed by the lex rei sitæ.
9. But as to personalty, these incidents are governed by the law of the domicil.
10. Legacy duty. Administration. Will of personalty.
11. Proof of foreign will in chancery. Foreign will may pass real estate.
12. The law seems to have been in dispute for long period, but now settled.
13. The American courts adhere to the same general rules as the English, but it was long doubted, as to the effect of change of domicil, after making will.
14. The words of a will of personalty are to be construed by law of domicil.
15. That law also governs, as to what is to be regarded as personality.
16. The law of the domicil governs as to what is testamentary.
17. The law in force at the decease of the testator governs as to wills.
18. The legislature may require all wills thereafter coming in force to conform to a new statute.
19. The law of the place of domicil governs, as to testamentary capacity.
20. The courts of the place of domicil have the proper jurisdiction of wills of personalty.
21. The disposition of personalty, governed by the law of the place of domicil.
22. Incidents, attaching to property by the foreign law of its situs, merely local.
23. But where a specific devise abroad is taken for debts, the devisee is entitled to compensation out of the estate.
24. The opinion of Mr. Justice Wayne in the matter of the will of Kosciusko.

[42] Sears *v.* Russell, 8 Gray, 86; Rich *v.* Waters, 22 Pick. 563.

[43] Abbott *v.* Bradstreet, 3 Allen, 587. In such a case, the word "heirs," will not include distributees of personal estate, even where the fund consists of both real and personal estate. Clarke *v.* Cordis, 4 Allen, 466.

25. But a will executed under a power, need not conform to the law of place of domicil.
26. What constitutes a will, and technical language, determined by law of domicil.
27. Copy of original probate filed in ancillary jurisdiction, conclusive.

§ 30 *a*. 1. It seems well settled, in the English law, that the law of the domicil of the owner of personal property, will govern in regard to the right of succession, whether such owner die testate or intestate. This question was discussed and determined by Sir *Cresswell Cresswell*, in the English Court of Probate, so lately as May 27, 1863, in a case [1] where one, * throughout life and at the time of his death, was domiciled in Portugal, where he died a bachelor, leaving one natural son. This son instituted a suit of filiation and inheritance in the Court of First Instance at Faro, and obtained a decree, by which he was declared entitled to the whole movable and immovable property of the father. This decree was ultimately confirmed by the Supreme Court at Lisbon.

* [1] Crispin *v.* Doglioni, 9 Jur. N. S. 653. The British Parliament have recently provided, 24 Vict. ch. 11, for ascertaining the law of foreign countries, whenever the same shall come in question, in any of the superior courts of the realm. The first section of this statute enables any of the superior courts within her Majesty's dominions, to remit a case, with queries, to a court of any foreign state or country, with which her Majesty may have made a convention for that purpose, for ascertainment of the law of such State.

By sect. 2, where a certified copy of the opinion is obtained, either party may move the court to apply that opinion, "and the said court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself, upon a case reserved for the opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the same opinion has been obtained, before trial, order such opinion to be submitted to the jury, with the other facts in the case, *as conclusive evidence* of the foreign law therein stated, and the said opinion shall be so submitted to the jury."

It is obvious, to any one experienced in the trial of matters, depending upon the testimony of experts, that no certainty is attainable in that mode. And it * would scarcely be regarded as an overstatement of the case, were we to add, that in every case, where the testimony of experts is resorted to, for the purpose of aiding the court, or jury, in questions in which they were not before experienced, there is never any difficulty in procuring any required amount of professional testimony, upon either side, of any question; and the result more commonly reached is, that instead of clearing up and removing doubts and obscurities, it positively tends to enhance both. This is a fact which might appear paradoxical, at first view, to those not experienced in such trials, and would require more space in explanation here, to render it clear to unprofessional minds, than we should feel

2. And it was held, by the English courts, that as to the personal estate situated in England, being certain stock in the English funds, the right of succession must be determined by the law of Portugal; and that as the proper courts in that country, upon full hearing, and the appearance of the parties to this suit, had already decided to whom the inheritance belonged, the courts in England were bound by that decision.[1]

3. The words of the learned judge are so pertinent to this perplexing question, that we deem it proper to repeat them here. "It was contended, that the judgment ought not to be considered satisfactory, because the evidence before me showed, that it was not in conformity with the Portuguese law, and that the facts in the case, had not been correctly understood. As is usual in such cases, experts were examined on each side, who gave conflicting evidence as to the law of Portugal. They did * not quote decided cases, and their evidence did not go beyond their opinion, as to the true meaning of certain ordinances which were read in evidence. That such conflicting testimony should be given, cannot be matter of surprise to any one accustomed to legal proceedings. Very learned members of the legal profession, in this country, often entertain different opinions on points of law. Similar differences are found on the bench, where the parties expressing them cannot be in any way biassed by the feelings of advocates; and even in the court of last resort, the House of Lords, it sometimes happens that the law lords are not unanimous in favor of the successful party. The difficulty of arriving at a correct conclusion as to the foreign law; at all times great, is much increased where experts are examined and give conflicting testimony, for the court has no means

justified in devoting to that purpose. But of the fact there can be no question whatever. And it may afford some ground for adopting some course, in the American states, similar to that referred to above, as already adopted in England. In a recent case before the House of Lords, DiSora *v.* Phillipps, 33 Law J. ch. H. L. 129; 10 Ho. Lds. Cas. 624, it was decided, that, in the construction of foreign documents in the English courts, the judge or court must obtain, first a translation of the document; secondly, explanation of any terms of art used in it; thirdly, information on any special law; and fourthly, on any peculiar rule of construction of the foreign state affecting it: and it is the duty of the English court, with such light, to construe the document. In general, a foreign decree of the probate of a will, is sufficiently authenticated for use as evidence in the domestic forum by recording an exemplification of the record of the foreign court in the proper domestic court of probate. Isham *v.* Gibbens, 1. Bradf. Sur. Rep. 69.

of ascertaining the comparative merits and learning of the witnesses.

4. "This difficulty I have not now to encounter, for, after consideration, I have come to the conclusion, that it does not belong to this court to sit as a court of appeal from the Portuguese courts. It is beyond dispute, that Henry Crispin died, domiciled in Portugal, and therefore the succession of his personal estate must be determined by the law of Portugal.[2] The law of the domiciled applies equally, whether the party, whose succession is in question, died testate or intestate. The law on this subject has never been more clearly or more forcibly stated, than by the present Lord Chancellor, in the case.[3] His lordship there says:

* 5. 'I hold it to be now put beyond the possibility of question, that the administration of the personal estate of a deceased person belongs to the court of the country, where the deceased was domiciled at his death. All questions of testacy, or intestacy, belong to the judge of the domicil. It is the right, and duty, of that judge to constitute the personal representative of the deceased. To the court of the domicil belong the interpretation and construction of the will of the testator. To determine who are the next of kin, or heirs of the personal estate of the testator, is the prerogative of the judge of the domicil. In short, the court of the domicil is the forum concursus to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.'

6. "To that court the present plaintiff did resort, as alleged in his declaration. The very same points were then raised, that have been put in issue in this court. A judgment was there pronounced in favor of the plaintiff, and that was affirmed, on appeal, by the Supreme Court at Lisbon. By that judgment it was decided, that the plaintiff is entitled to the inheritance of the deceased Henry Crispin. By that judgment I feel that I am bound."

7. This subject was examined in the House of Lords in England

* [2] Stanley *v.* Bernes, 3 Hagg. Ecc. 373, in which case the succession was that of an English subject domiciled in Portugal. Bremer *v.* Freeman, 10 Moore, P. C. C. 306, and many other cases.

[3] Enohin *v.* Wylie, 8 Jur. N. S. 897; 31 Law J., H. L. 404; 10 Ho. Lds. Cas. 1. The copy of a foreign will, contained in the ancillary probate, granted in England to the foreign * executors, is the only admissible evidence of the will. Enohin *v.* Wylie, 10 House Lords Cas. 1.

in a recent case,[4] where it was held, that a will must be executed according to the law of the country, where the testator was domiciled at the time of his death, so far as personalty is concerned. The Lord Chancellor, *Chelmsford*, said, in giving judgment: "There is no doubt it is the province and * the duty of ecclesiastical courts to ascertain what was the domicil of the party whose will is offered for probate, in order to ascertain whether that is a valid will, the testator having complied with the requisites of the law of the country in which he was domiciled. But if probate is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled." . . . "No other court could go back upon the factum, and raise any question upon the validity of the will."

LAW GOVERNING FOREIGN WILLS.

8. It is scarcely necessary to state, that in regard to real property, the mode of execution, the construction, and the validity of a will must be governed, exclusively, by the lex rei sitæ. The descent of real estate, as well as the devise of it, are governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence, or the security of any independent state or nation, that these incidents should be liable to be affected, in any manner, by the legislation, or

[4] Whicker *v.* Hume, 7 Ho. Lds. 124. The case of Douglas *v.* Cooper, 3 My. & K. 378, is here cited, as having ruled, that the probate of a will is conclusive in regard to its execution in due form, according to the law applicable to the case, and that the principle applies even when that is the law of a foreign state. In regard to the probate of foreign wills, the recent decisions in the English court of probate show, that it must be made to appear, either that the same has been recognized as valid by a court of the country of the domicil, or that it is a valid will by the law of that country, and that the testator was at the time of his death domiciled in such foreign country. De Vigny in re, 13 Law T. N. S. 246. An official copy of the act of recognition by such foreign court must be produced, and a notarial certificate of the fact is not sufficient. If the will was originally written in the English language, and was translated into the foreign language in the act of probate or recognition, and it is sought to be here established by force of the decree of the foreign court, a retranslation of the translation must be produced; but if an original will is sought to be here first established, but which is not in the English language, a translation of the original must be proved, or a copy of the original, when that is in the English language. Ib. Deshais in re, 13 W. R. 640; 12 Law T. N. S. 54.

the decisions of the courts, of any state or nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable, that we should scarcely feel justified in occupying much space in reviewing the cases.[5]

9. And it is equally clear, that personal estate is, in all respects, governed by the law of the domicil of the deceased owner, both in regard to its distribution, where there is no testament, and equally, where there is one, as to the requisites, validity, and construction of such testament. But as to the court, and the * mode of administration, the law of the place where such personal estate is situated will prevail.[6] But the rule does not apply to a will made in execution of a power.[7] And the will of an English testator must be construed according to the meaning of the terms used in the English law; and therefore a child born in France, and illegitimate at birth, but legitimised according to the French law by the subsequent marriage of the parents, both being domiciled in France, is not entitled to a bequest of personal estate to the child of A, one of its parents, contained in the will of an English testator.[8]

So under a bequest to the children of S., who had three children born to him by a woman with whom he cohabited in England where they were both domiciled, and who removed with her to Holland, and continued the cohabitation, and were subsequently married in Holland, both being domiciled there, and who had children born there both before and after the marriage, all of whom, including those born in England, thereby became legitimate, it was held, that all the children born in Holland were entitled to share equally in the bequest, but that those born in England could not take, their illegitimacy being fixed by the law of the place of domicil at birth.[9]

[*5] 1 Jarman, ed. 1861, 1; Bovey *v.* Smith, 1 Vernon, 85. It is here said, that wills in Latin or Dutch must be so framed as to pass an estate according to our law, this having reference to real estate in England. Drummond *v.* Drummond, cited 2 V. & B. 132; Brodie *v.* Barry, 2 V. & B. 131.

[*6] 1 Jarman, 2 and notes; Anstruther *v.* Chalmer, 2 Sim. 1; Price *v.* Dewhurst, 8 Sim. 299; 4 My. & Cr. 76; Spratt *v.* Harris, 4 Hagg. 408; Ferraris *v.* Hertford, 3 Curt. 468; Croker *v.* Hertford, 4 Moore, P. C. C. 339; Reynolds *v.* Kortwright, 18 Beavan, 417; Robins *v.* Dolphin, 27 L. J. Prob. 24. Stock in the public funds is regarded, of course, as personal estate. In re Ewin, 1 Cr. & J. 151.

[7] Alexander in re, 6 Jur. N. S. 354.

[8] Boyes *v.* Bedale, 9 Jur. N. S. 196; S. C. 12 W. R. 232, before N. C. Wood.

[9] Goodman *v.* Goodman, 3 Giff. 643.

10. And as to legacy duty, it seems to be now settled in England, although long in controversy, that where the domicil is foreign, that legacy duty is under no circumstances payable.[10] * But in regard to the general incidents of administration, there can be no question they are governed by the law of the place of administration, which is, that where the goods and effects are situated, without reference to the domicil of the deceased. But what is the last will of the deceased, he having his domicil abroad, and how it is to be executed, so far as personal estate is concerned, is to be determined exclusively by the law of the place of domicil.[11]

[10] Re Bruce, 2 Cr. & J. 436; Hay *v.* Fairlie, 1 Russ, 117; Logan *v.* Fairlie, 1 My. & Cr. 59, reversing the decision in 2 Sim. & Stu. 284; Arnold *v.* Arnold, 2 My. & Cr. 256; Commissioners *v.* Devereux, 13 Sim. 14; Thomson *v.* Adv. Gen. 12 Cl. & Fin. 1; s. c. 13 Sim. 153. See re Coales, 7 M. & W. 390; Attorney-General *v.* Cockerell, 1 Pr. 165, and the Same *v.* Beatson, 7 Pr. 560, which are now clearly overruled.

But where the testator has a representative appointed in England, for the purpose of collecting his personal effects situated in that country, and elsewhere, and the testator is domiciled there, legacy duty is payable, not only upon that portion of the effects belonging to the estate, situated in that country, and which rendered the administration there necessary, but upon all the effects collected elsewhere, and remitted to England to be there distributed. In re Coales, 7 M. & W. 390; Attorney-General *v.* Napier, 6 Excheq. 217; Re Ewin, 1 Cr. & J. 151.

But if the will is not proved in that country, and there is no administration there, no legacy duty is payable, although the amount is payable to the legatee in England out of funds in the hands of the foreign agent in that country, at the time of the decease of the testator, or are collected abroad where the testator resided, and remitted to the executors in England, and there administered under a decree of the Court of Chancery. Arnold *v.* Arnold, 2 My. & Cr. 256; Jackson *v.* Forbes, 2 Cr. & J. 382; s. c. nom. Attorney-General *v.* Jackson, 8 Bligh, N. S. 15.

But the English cases are not entirely reconcilable upon this point, and may not be entirely applicable to the several state statutes in force, or to that of the United States recently come in force. The following cases have more or less bearing upon questions as to legacy duty under the English statute. Attorney-General *v.* Dimond, 1 Cr. & J. 356; Same *v.* Hope, 1 Cr., M. & R. 530; 2 Cl. & Fin. 84; 8 Bligh, 44; Drake *v.* Attorney-General, 10 Cl. & Fin. 257, affirming Platt *v.* Routh, 3 Beav. 257; 6 M. & W. 756, and overruling Attorney-General *v.* Staff, 2 Cr. & M. 124; and Palmer *v.* Whitmore, 5 Sim. 158. See also, 4 M. & W. 171; 9 Sim. 430; 6 Sim. 570.

[11] Lord *Cottenham*, Chancellor, in Price *v.* Dewhurst, 4 My. & Cr. 75, 82, 83, and the summary of cases in the ecclesiastical courts there cited and commented

11. In the State of New York, statutory provisions exist for making probate of foreign wills before the Court of Chancery, by means of the appointment of commissioners to take the proofs. The petitioner must show, that the decedent left assets within the state, or that such are within the state at the time of the application, and that the petitioner is interested in the same, and what probate court has the proper jurisdiction of the case, and whether the will is to be proved as a will of real or personal estate, or both.[12] And it must appear, that the will, so far as personal estate is concerned, was duly executed according to the laws of the country where the testator was last domiciled. It was here held, that a Scotch deed of disposition and settlement, if duly executed as a last will and testament by the laws of Scotland, where the * testator was domiciled at the time of his decease, and in the presence of two witnesses, as required by the laws of New York, was a valid will of the testator's real and personal estate in that state.[12] In those American states, where the probate of wills is conclusive both of real and personal estate, the courts of equity will not assume jurisdiction to compel the performance of a trust arising under a will proved in another state, but of which there has been no probate, or its equivalent, by filing a copy of the original probate, in the state where the trust is claimed to be enforced, and into which state the funds belonging to the estate have been removed by the personal representatives. Such probate and administration is entirely local, and the personal representative appointed in one state, or his authority, cannot be recognized in any other state.[13] The rule is again recognized by the same court, as to funds directed by a testator in England to be remitted to a person in Boston, and by him held in trust for certain purposes under the will. The will had been regularly proved in the Prerogative Court of Canterbury, but no copy filed in Massachusetts, as required by the statute of that state, and the court held, that a

upon. Hare *v.* Nasmith, 2 Add. 25; Stanley *v.* Bernes, 3 Hagg. 373; Curling *v.* Thornton, 2 Add. 6, 21, 22. See also, Thornton *v.* Curling, 8 Sim. 310.

[12] Easton's Will, 6 Paige, 183. The proof being made before the Court of Chancery, the decree is to be remitted to the proper surrogate having jurisdiction of administration, with direction to grant letters, and proceed with the administration in due course. See also, Robert's Will, 8 Paige, 446, 519.

*[13] Campbell *v.* Sheldon, 13 Pick. 8. We shall have occasion to discuss this question more in detail, when we consider the question of the probate of wills.

Court of Equity had no jurisdiction to enforce the trust under the will, until it was made a record in the Probate Cout there.[14]

12. It was for a long period made a question, whether it was indispensable for the will of the testator, domiciled abroad, to conform to the requirements of the law in the place of domicil, in order to pass the title to personalty. And so lately as 1840, the distinguished Chancellor of New York, in the case of Roberts' Will,[15] states the law thus: "The better opinion," seems to be, "so far as regards the mere formal execution of the testament, it is sufficient, if it conforms to the law of the country * where the will is made, according to the maxim, locus regit actum." [16] And the learned judge adds: "Probably the testament may also be valid if made and executed in conformity to the law of the testator's domicil, although it does not conform, in all respects, to the lex loci actus." But it is entirely well settled, and has been for many years, that a will of personalty must conform to the law of the place of the domicil of the testator at the time of his decease, and that it will not be entitled to probate unless it do so conform; and that it will make no difference in that respect, that the testator is a native of England, and that the personal estate is there situated, and that the will is made in conformity with the English law. If it do not also conform to that of the place of the domicil of the testator, it is wholly inoperative, so far as personalty is concerned.[17]

[14] Campbell *v.* Wallace, 10 Gray, 162.

[15] 8 Paige, 519, 525.

[16] See 17 Guyot, Repert. De Juris, art. Testament, 186; 4 Burge, Col. & For. Law, 583; Civil Code of Louis. art. 1589.

[17] Stanley *v.* Bernes, 3 Hagg. 373–465; Moore *v.* Darrell, 4 Hagg. 346, 352; and other cases before cited to the same point. It is true, that even as late as 1823, Sir *John Nicholl* held, that in regard to a British subject, domiciled in a foreign country at the time of his decease, and whose will was executed according to the law of England, but not according to that of the place of domicil, it would be valid to pass personalty, but chiefly upon the ground, that it was not competent for a British subject, to so completely divest himself of allegiance as to come under the same law in that respect as one never owing any allegiance there. He admitted, that as to British subjects, domiciled in any part of the United Kingdom, the law of their domicil must govern, both as to successions and testaments, and that the same rule must govern as to foreigners, domiciled abroad, but having personal estate in England. The point which he has made was, that a British subject, resident abroad, and having personal estate in England, could not so far defeat the operation of the law of his own country as to such estate, as to render an English will void in regard to it. Curling *v.* Thornton, 2 Add. 6, 10–25. But even in this case, after

* 13. The American courts early adopted the same rule, and so far as we have been able to ascertain, by careful examination, have uniformly adhered to it.[18] But a question of more difficulty has arisen in some cases, and where there seems to exist a serious conflict of authority, and especially among the Continental jurists of Europe, that is, whether a will, executed in conformity to the law of the place where made, and of the domicil of the testator at the time of its execution, is rendered inoperative by a change of domicil of the testator, by reason of not conforming to the law of the place of the domicil, at the time of the decease of the testator. This question arose in a case in New York, which passed through all the subordinate * courts, and was finally determined by the Court of Appeals,[19] where it was held, three of the judges dissenting, that whether a deceased person died intestate or not, is to be determined by the law of the place where he was domiciled at the

probate of the will in the ecclesiastical courts by the executor, application was made to the Court of Chancery, 8 Sim. 310, and Sir *L. Shadwell*, V. C., held, that he could not revise the decision of the Ecclesiastical Court in regard to the probate, but that he was at liberty to hold, that notwithstanding such probate, the will had no operation beyond the appointment of the executor, which seems to us a view not easy to maintain, upon established principles, the probate being conclusive, not only as to the validity of the appointment of the executor, but equally as to that of the will itself in all its provisions, until reversed or set aside. But upon appeal to the Court of Delegates, this doctrine of Sir *J. Nicholl* was declared untenable, and the rule established, which is stated in the text, and this now everywhere prevails in England and America, or if there are any exceptions, they are of so limited an extent, and of so little weight, as authority, as not seriously to bring the rule in question.

[18] Desesbats *v.* Berquier, 1 Binn. 336. See Parsons *v.* Lyman, 20 N. Y. Ct. of App. 103; Moultrie *v.* Hunt, 23 id. 394; s. c. 3 Bradf. 322; Grattan *v.* Appleton, 3 Story, C. C. 755; Story, Confl. Laws, § 468. And it makes no difference, that the will is executed according to the law of the place where the goods are found. If not executed in conformity to the law of the domicil of the testator, it will not be sufficient to pass personalty. Desesbats *v.* Berquier, supra; Grattan *v.* Appleton, supra; Parsons *v.* Lyman, 20 N. Y. Ct. App. 103.

The Massachusetts statute, allowing the will of any inhabitant, made in conformity to the law of any other state, to be admitted to probate there, applies to every kind of testamentary act. Where a testator, therefore, who had made his will in Massachusetts, subsequently made a paper as follows, in the State of New York, "It is my wish that the will I made be destroyed, and my estate settled according to law," which was duly executed as a will by the laws of New York, but not according to the laws of Massachusetts; it was held operative here as a will, to make the former void. Bayley *v.* Bailey, 5 Cush. 245.

[19] Moultrie *v.* Hunt, 23 N. Y. 394; s. c. 3 Bradf. Sur. Rep. 322.

time of his death. That is the law which prescribes the requisites for the valid execution of a will of personal estate. Thus, where a citizen of South Carolina executed his will in such a manner, as to be a valid bequest of personal property according to the law of that state, but not according to the law of New York, and subsequently established his domicil, and died in the State of New York, it was held, that he died intestate, as to personal property in that state.[19] The same conclusion is reached by Mr Justice *Story*,[20] after a careful review of the authorities. And it seems to us there can be no question, that the true construction and just application of principle to the case, must lead to this conclusion. The same point was decided in Missouri.[21]

[20] Confl. Laws. § 473, citing 1 Binney, 336; Pottinger *v.* Wightman, 3 Meriv. 68; Henry, and other foreign jurists.

[21] Nat *v.* Coons, 10 Mo. 543. It is here said, that if such a will be made according to the laws of the state where the testator had his domicil at the time, it is not requisite that it be republished in that state, after the testator's removal there, although made in conformity to the laws of another state, where the testator had his domicil at the time of its execution. See also, 1 Jarman, 5; 25 Beav. 231, 232.

And where a paper was made thus: "Codicil 1st; I request my executors and trustees will, after my decease, pay to Mrs. M. C. C. £ 100 sterling, annually, in quarterly payments, during her life, out of my American property," the maker being a British subject, and having delivered the paper to one in Boston, with request to keep the same until after his death, or till he should call for it, and it having remained in the custody of such person till after the death of the maker, it was held, that such paper was not a donatio mortis causa, but of a testamentary character, and that it was rendered wholly inoperative by a subsequent will of the maker, made in England, and there proved and recorded in Massachusetts, by which he revoked all former wills, and disposed of his American property. Coffin *v.* Otis, 11 Met. 156. And where a person domiciled in the state of Ohio, being temporarily at New Orleans, made his will in conformity with the laws of the state of Louisiana, but not with those of Ohio, and afterwards returned to the latter state, where he retained his domicil until his decease, when his will was regularly admitted to probate in the state of Louisiana, and a copy of the same and of the probate duly recorded in the probate office in the state of Ohio, upon a bill in equity in the latter state to set aside the will as invalid by the laws of that state, it was held, that the copy of the will was improperly admitted to record in the State of Ohio; that, by the settled rule of international law, the jurisdiction to determine the validity or invalidity of the will belonged to the courts of that state; and that the 28th section of the wills act of 1840 (1 Curwen, 708), providing for the admission to record in that state of "authenticated copies of wills executed and approved according to the laws of any state or territory of the United States," relates only to wills *proved* in a court to which the jurisdiction to make original

* 14. It has accordingly been held, that the words of a will of personalty are to be construed with reference to the law of the domicil of the testator, unless there is some evidence of a different intention. Thus, where one, born and domiciled in England, made his will, giving his personal estate to his heir at law, it was held to import the heir at law, according to the definitions of the English law.[22]

15. And it seems the better opinion, that the law of the domicil of the testator will govern as to what shall be regarded as personal estate, and what real. The intimation, therefore, in the first edition of Mr. Jarman's work on Wills,[23] that this law will only govern as to movables, in the language of the Civil Law, and that it will

probate in the case properly belongs, under the established rules of law. Manuel et al *v.* Manuel; 13 Ohio State, 458.

This rule may be sound as to the effect of recording in one state the probate of a will made in another. The record of such probate could scarcely be regarded as of more force than the probate itself; and, as that was in the wrong jurisdiction it may be consistent with established precedents to treat it as void. But this rule will certainly not apply to an original probate had in the proper jurisdiction. Such a probate is conclusive against all the world; and a court of equity has no power whatever to set it aside for any defect, either in the will or the proof, or for any other cause, unless the probate itself were fraudulently obtained. We have explained this matter fully, in our edition of Story Eq. Ju. vol. 2, § 1575. There is a late case in California which seems to us, to state the true force of a regular probate, very fairly. State *v.* M'Glynn, 20 Cal. 233. The point is here thus stated. A will, having been once admitted to probate, must, so long as the probate stands, be recognized and admitted in all courts to be valid. In England, it is well settled by a long series of decisions, that the comprehensive jurisdiction exercised by courts of chancery in setting aside instruments obtained by fraud does not extend to wills, and that those courts have no power to determine the validity of a will of personal property. In the United States, the courts have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country, and that whenever, in any state, the power to probate a will is given to a probate or surrogate's court, the decree of such court cannot be set aside or vacated by the court of chancery on the ground that the instrument was obtained by fraud, or on any other ground (except as stated above). The probating of a will is not (solely) a proceeding to decide a contest between parties, but a proceeding in rem to determine the character and validity of an instrument affecting the title to property, and which it is necessary, for the repose of society, should be definitely settled by one judgment; and therefore the decree of probate is conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts.

[22] Harrison *v.* Nixon, 9 Peters, U. S. 483.

[23] P. 4, and note, vol. 1.

not apply to leaseholds, which are not included among movables, although regarded as personalty by the English law, has not been acquiesced in by the profession, or the courts.[24] It has been held, accordingly, that a Scotch heritable bond, although it contain a personal obligation to pay the debt, does not, on that account, lose its heritable quality, and will not pass by an English will, but descends to the heir at law.[25]

16. And the law of the place of domicil must govern as to what ought to be regarded as testamentary capacity.[26] Thus, administration was granted upon the probate of the will of a married woman, domiciled in Spain, she being also a native of that country, it appearing that, by the law of that country, a feme covert may dispose of her property by will, with certain limitations, the same as a feme sole.[27]

* 17. It has become a question of considerable importance in the American states, by what law, with reference to the execution of the will and the decease of the testator, the validity of a will is to be governed.[28] Upon general principles, there would seem no question that the validity of a will should be determined by the law in force, when the instrument becomes operative. But there seems to have been considerable difference of opinion upon the point, the great weight of principle, if not of authority, being, however, in favor of the proposition just stated. It has been held in Massachusetts, that the provision in the Revised Statutes of that state, that after-acquired lands of the testator should pass under a will, where that appeared to have been the intention of the testator, should apply to wills already in existence.[29] And it was here said by

[24] See note to 1 Jarman, 4 Eng. ed. of 1861.

[25] Jeringham *v.* Herbert, 4 Russ. 388.

[26] Ante, n. 8; post, pl. 24 b.

[27] Re Maraver, 1 Hagg. 498; Re Gayner, 4 Notes Cas. 696. See also, as to the law of Spain, respecting testamentary disposition. Moore *v.* Budd, 4 Hagg. 346.

[28] In most of the states, the law upon this subject is liable to considerable variation, in consequence of the increasing disposition, constantly to amend the law upon all subjects. And although the amendments in regard to wills, more commonly contain provisions, saving those already executed according to the provisions of the former law, this is not always the case.

[29] Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterson, id. 262. The Supreme Court of the United States held, in Carroll *v.* Carroll's Lessee, 1 How. 275, that a similar statute of the state of Maryland, made without the qualification of the Massachusetts statute, that it should apply only where such appeared to be the intention of the testator, but fixing the construction of all wills, could only be applied to wills,

Wilde, J.: "That the statute * disturbs no vested rights, for, before the death of the testator, his heirs had no right whatever to any part of his estate. This statute is, therefore, to be construed like other statutes, according to the meaning of its language, and the intention of the legislature." — "That the legislature had the constitutional power to enact such a law is not to be denied."

18. It seems equally clear, upon principle, that the legislature must have full power to alter the law, as to the validity of wills, and to require additional formalities in their execution, although it may have the effect to annul existing wills, since no rights can have vested under them, until after the decease of the testator. There can be no more question of the right of the legislature to apply such a

thereafter made. And the same course of argument would seem to lead to the conclusion, that general statutes, in regard to the execution of wills, should only extend to such as might be hereafter executed. This is matter of construction, in regard to which there is room for doubt. But wherever a statute is so framed, as to show an intent to reach all wills which shall thereafter become operative by the death of the testator, there can be no question of the power of the legislature to give them that operation.

The subject has recently been discussed, very elaborately, in the Supreme Court of Pennsylvania, and the conclusion arrived at, that wills are to be governed, as to their operation upon future acquired real estate, by the law in force at the time of their execution, and not by that in force at the decease of the testator. Gable's Ex'rs *v.* Daub, 40 Penn. St. 217. The court rely upon the English cases in regard to charitable uses created by wills, executed before the statute of mortmain, but where the testator deceased afterwards, and where it was held, that the provisions of that statute did not apply. Ashburnham *v.* Bradshaw, 2 Atk. 36, referred to with approbation, in Attorney-General *v.* Lloyd, 1 Vesey, 33, 3 Atk. 552; Attorney-General *v.* Andrews, 1 Vesey, 225. Those cases, where wills, executed before the statute of frauds, according to the existing law, and which were upheld, although the testator deceased after that statute came in force, are here referred to as favoring the conclusion to which the court came. Tuffnell *v.* Page, 2 Atk. 37. See also, Attorney-General *v.* Bradley, 1 Eden, 482; Attorney-General *v.* Downing, Dickens, 414. There are other cases, in this state, holding the same view. Mullen *v.* McKelvy, 5 Watts, 399; Murry *v.* Murry, 6 Watts, 353; Lewis *v.* Lewis, 2 W. & S. 455; Mullock *v.* Souder, 5 W. & S. 198; Kurtz *v.* Saylor, 8 Harris, 205. It seems that at one period, it was decided by a majority of the Supreme Court of this state, the opinion being delivered by Chief Justice *Gibson*, that wills were to be judged by the law existing at the decease of the testator. But the case has not been reported, and did not have the effect to change the current of decision in that state. There will always be felt a strong inclination in the courts, to uphold wills, executed according to the existing state of the law, and not to declare them invalid by reason of any change in the law, unless it is very clear that such was the intention of the legislature. And as matter of construction, this is not unreasonable.

law to existing wills, than to the right to change the law of descents, or distributions, as to the estates of such persons, as may decease after the enactment of the law. * It was accordingly held in New York, that where a will was made before the Revised Statutes came into operation, but the testator died afterwards, the validity of the trusts and provisions of the will must be determined by the law, as it existed at the decease of the testator.[30] And it is clear also, that a will executed before the passage of a statute, and not in conformity to the then existing law, but which is in conformity to the new law, will be regarded as a valid will, if the testator decease while such new law is in force.[31]

19. The law of the domicil governs as to the testamentary capacity, which extends, not only to general capacity to make a will, but also to the disposable power over the estate.[32]

20. And the decisions of the court of the place of the domicil of the testator, as to the validity, or the revocation, of a will of personalty, are held conclusive upon all other courts, but not so as to realty, not within that jurisdiction.[33]

21. And the provisions of a will made by a testator domiciled here, in regard to the investment of his personal estate, situated * within the foreign jurisdiction of the place of his domicil, in violation of the law of the place of the domicil, but not in violation of the law of the place where the investment is directed to be made, cannot be upheld. The personal estate, and the proceeds of the

* [30] De Peyster *v.* Clendining, 8 Paige, 295; Bishop *v.* Bishop, 4 Hill, 138; ante, § 30, n. 38.

[31] Lawrence *v.* Hebbard, 1 Bradf. Sur. Rep. 252. This was the case of a will, executed while the law required three witnesses to a will, but this will, having but two witnesses, was, therefore, clearly invalid. But by the Revised Statutes, in force at the decease of the testator, only two witnesses were required, and it was held, the will was legally executed; ante, § 18, pl. 25.

[32] Schultz *v.* Dambmann, 3 Bradf. Sur. Rep. 379.

[33] Bloomer *v.* Bloomer, 2 Bradf. Sur. Rep. 339. Hence, it is the practice of the ecclesiastical courts and Court of Probate, in England, to grant probate of the wills of Englishmen, domiciled in the British territories in India, which have been proved there, without inquiring into the grounds of the proceedings in India, although the bulk of the property may happen to be in England. Re Read, 1 Hagg. 474; Hare *v.* Nasmyth, 2 Add. 25. And such is the general practice in the American states. But where the will is first proved, away from the forum of the proper domicil of the testator, such probate will not be regarded with the same respect when brought into the forum of the domicil. Nat *v.* Coons, 10 Mo. 543.

real estate, must be disposed of in conformity to the law of the domicil of the testator, especially if within that jurisdiction.[34]

22. By the Code Napoleon, which is the law of Holland, as well as of France, the surviving parent is entitled to the income of the children's estate, until they attain eighteen years of age. But it was held, that this incident of the local law did not attach to an estate in Holland, decreed to children, on account of a marriage settlement of their deceased mother, the children being born, and always residing with their father in England, and that the father could not claim the income of such estate, while the children were under eighteen.[35] Sir *Lancelot Shadwell*, V. C., said: "The claim of the father does not arise by virtue of the contract, but solely by the local law of the country, where he was residing at the time of the marriage, and therefore this property must be considered just as if it had been an English legacy, given to the children."

23. Some curious questions have arisen in regard to marshalling assets in different countries. A native and constant resident of Holland, made his will there in due form, giving certain houses to charitable objects, and then gave all the residue of his estate to the defendant, making him his universal heir and executor, he having effects to a considerable amount in England.[36] The executor did not prove the will in Holland, as, if he did, by the law of that country he became liable for all the debts of the deceased, without regard to the amount of property which had come into his hands. But the executor proved the will in * England, and took possession of the testator's effects there. The plaintiff, being the charitable legatee in Holland, came into chancery to compel the executor and residuary legatee to reimburse him for the houses specifically bequeathed to him, and which had gone to pay the testator's debts in Holland; and the court held, that the plaintiff was entitled to be reimbursed, for the value of his specific devise, which had been taken to pay the debts of the testator.

24. The question in regard to the law which governs the succession to intestate estates, is discussed somewhat extensively by Mr. Justice *Wayne*, in the case of the will of Kosciusko,[37] and the rule

[34] Wood *v.* Wood, 5 Paige, 596.

[35] Gambier *v.* Gambier, 7 Simons, 263.

[36] Bowman *v.* Reeve, Prec. Ch. 577.

[37] Ennis *v.* Smith, 14 How. U. S. 400.

fully recognized, that it is the law of the place of domicil as to personalty, which must govern in all cases, citing the early English cases in confirmation of the judgment pronounced.[38] The rule also prevails, says the learned judge, in the ascertainment of the person who is entitled to take as heir or distributee. It decides whether primogeniture gives a right of preference, or an exclusive right to take the succession; whether a person is legitimate to take the succession; whether the person shall take per stirpes or per capita, and the nature and extent of representation.

25. It has lately been held in the English Court of Probate,[39] that the rule of law, that a will of personalty must be executed in conformity to the law of the testator's domicil, as it existed at the time of his decease, does not apply to a will made in execution of a power. In the course of the opinion, Sir *Cresswell Cresswell* took occasion to correct an observation made by him * in another case,[40] to the effect, that the rule of law upon this subject, as laid down in Tatnall *v.* Hankey,[41] in these words, "A will disposing of personal estate, situated in this country, in pursuance of a power of appointment, and executed in compliance of the requirements of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the party making it," was not maintainable. The learned judge said, he had since been furnished with the actual judgment of the Privy Council, in these words, "That the validity of the will of the said deceased, so far as regards the appointment [there] does not depend upon the law of the domicil of the testatrix at the time of her decease," and that he was bound to act upon that decision. This is upon the ground, that where the execution of the power is in conformity with the instrument giving the power, it is sufficient, since the donee under the power and its execution, takes by force of the power, and not of its execution, except incidentally. Hence if the will, made in execution of the power, is in conformity with the law of the domicil of

[38] Pipon *v.* Pipon, Amb. 25, 27; Thorne *v.* Watkins, 2 Vesey, 35. See also, 3 Paige, 182. The case of Ennis *v.* Smith, supra, which involved the consideration of the domicil of Kosciusko, and the construction of his will, and how far he died intestate, is in many respects a most interesting case upon this subject, and contains many valuable incidents connected with general history, q. v.

[39] In re Alexander, 6 Jur. N. S. 354.

[40] Crookenden *v.* Fuller, 5 Jur. N. S. 1225.

[41] 2 Moore, P. C. C. 342.

the party at the time the power is conferred, it is all which is fairly implied in the power.[42]

26. It was recently decided in the English Court of Probate,[43] that the law of the domicil, at the time of the death of the testator, as to what constitutes the last will, is binding on other countries. And that where a will, made in an acquired domicil, uses technical language of the native domicil, the courts of the acquired domicil resort to the law of the native domicil for the purpose of ascertaining the meaning of such language.[44]

27. And where a will is executed in a foreign jurisdiction, and has been there duly proved, and a copy of such probate * duly allowed and filed in the proper probate court of the ancillary administration, it will be presumed that the probate court of the place of domicil had jurisdiction of the same, unless the contrary appears, and all exceptions to the validity of the foreign probate must be taken at the time of the admission of the copy in the ancillary jurisdiction, or they will be considered as waived.[45]

SECTION III.

STATUTES PASSED PENDING THE SETTLEMENT OF ESTATES.

1. Statutes affecting procedure merely will operate upon estates in course of settlement.
2. In matters affecting the expense of settlement and in the discretion of the judge, rule the same.
3. The right of the heir vests upon the descent cast.
4. The right of a distributee also vests from the decease.
5. So also in regard to the right of the widow of the intestate.

n. 8. Abstract of the rule which obtains in Connecticut.

6. The right of a distributee becomes vested at the decease of the intestate in Massachusetts.
7. But the assignments for support of widow and family are not vested until made.
8. And the right of the widow to waive the will and claim dower, &c., is personal.
9. The extent to which legislative acts affect estates in course of settlement.
10. Clearly cannot affect vested rights.

§ 30 *b*. 1. THERE can be no doubt of the validity of statutes passed during the settlement of an estate, requiring conformity to its pro-

[42] 1 Jarman, 5, ed. 1861; ante, § 21, pl. 27.

[43] Laneuville *v.* Anderson, 2 Swab. & Trist. 24; 6 Jur. N. S. 1260.

[44] Martin *v.* Lee, 4 Law T. N. S. 651; ante, pl. 10, n. 8.

[45] Townshend *v.* Downer, 32 Vt. 184. The same rule obtains in New Hampshire. Barstow *v.* Sprague, 40 N. H. 27.

visions, in all future proceedings in the administration of estates of deceased persons, whether deceased before or after the date of such statutes, at least so far as the mode of procedure is concerned.

* 2. There may be some other matters, not exactly confined to the mode of procedure, but incidentally affecting the ultimate share to be distributed, either to creditors, legatees, or distributees, such as the expenses of administration, legacy duty, the maintenance of the family of the deceased person, and assignments to the widow, in the discretion of the probate court, which may nevertheless be subject to legislative control, upon general principles of legislation, allowing whatever concerns the remedy to be controlled by statute, pending the action. We should not be inclined to question the right of legislative interference, in the pending settlement of estates, to that extent.

3. But after the descent cast, or the decease of the ancestor, it is well settled, that the rights of the heir are vested from the moment of the decease.[1] The same rule is also held to obtain in regard to the devise of real estate, which is always regarded as specific. The rights of the devisee vest, under the will, immediately upon the decease of the testator.[2] And we make no question the same rule must apply to the specific devise of personal chatels, or estate.

4. But it seems to be well settled, both upon principle and authority, that the right of a distributee to a share in the estate of a deceased person, must be governed by the law in force at the time of the decease of the intestate. It is true, these rights depend entirely upon statutory enactments, and require to be in some sense upheld by the statute, yet, after the right has distinctly vested, it will not be affected, either by a repeal or * alteration of the existing statutory provisions.[3] The learned judge here states the law, thus: "It seems to be very clearly settled, and by a uniform current of authorities, that the distributive share in an intestate's estate, immediately upon the death of the intestate, vests in the heir at law,

*[1] Bank of Hamilton *v.* Dudley's Lessees, 2 Pet. U. S. 492; Wilkinson *v.* Leland, id. 627; Miller *v.* Miller, 10 Met. 393.

[2] Wilkinson *v.* Leland, 2 Pet. U. S. 627. All modifications in the settlement of estates, during the progress of the settlement of such estates, which may be effected by means of legislative action, concern the form rather than the substance of the proceeding, and affect the mode of obtaining the interest, rather than the extent of such interest. Calder *v.* Bull, 3 Dallas, 386; Rice *v.* Parkman, 16 Mass. 326.

*[3] *Dewey*, J., in Hayward *v.* Hayward, 20 Pick. 519.

and in case of his decease before a decree of distribution, the share belonging to him would go to his personal representative. In Brown *v.* Shore,[4] the case is thus stated: J. S. died intestate, leaving A and B his next of kin. A dies within a year, and before any actual distribution. It was held, by Lord *Holt*, that by the death of J. S., A acquired a present interest, and his share should go to his executor. In Cary *v.* Taylor,[5] it was held, that one's share in an intestate estate, is "an interest vested, and *that*, before any distribution made, or the time by the statute limited for the making distribution was expired." [6]

5. The same doctrine is also maintained in a considerable number of American cases, where the subject seems to have undergone a very careful consideration.[7] In a recent case in Connecticut,[8] the

[4] 1 Show. 25.

[5] 2 Vern. 302.

[6] Lord *Hardwicke* maintains the same view in Wallis *v.* Hodson, 2 Atk. 117. And the elementary books assume that such is the rule of law. 1 Mad. Ch. Pr. 637; Toller on Exrs., 304; 2 Roper on Wills, 210; Bac. Ab. Tit. Executors and Administrators, I. Van Tilburgh *v.* Hollinshead; M'Carter, 32.

[7] The Matter of Kane and others, infants, 2 Barb. Ch. 375; Smith *v.* Kearney, id. 533.

[8] Kingsbury *v.* Scovill, 26 Conn. 349. The law is thus stated by *Storrs*, J., in Kingsbury *v.* Scovill, pp. 353, 355. "Under the English statute of distributions, which was the basis of ours, and the construction of which by their courts is therefore to be most highly regarded, the doctrine was early established, that the distributive share of the estate of an intestate on his death, vests instanter in the person who has a right to it. In Wallis *v.* Hodson, 2 Atk. 118, the chancellor held, that the distribution of intestate estates is governed by the civil law; and said, that nothing is more clear, than that the civil law considers 'the child in ventre sa mere as absolutely born to all intents and purposes for the child's benefit. That opinion was confirmed in Scattergood *v.* Edge, 1 Salk. 229, and in Musgrave *v.* Parry, 2 Vern. 710. In 3 P. Wms. 49, note d., the rule is stated to be, that if A die intestate, and the person entitled to a distributive share die before a year expires, when distribution is to be made of the intestate's estate, the share of the person who died thus entitled, must not be distributed to the next of kin of such intestate, but to the next of kin to the person thus entitled, for the share vested in him, and from him was transmissible; and the case of Grice *v.* Grice, determined by Lord *Cowper* in 1708, is there mentioned, where a person died without a wife, leaving a father, who died without taking administration on his son's estate, and it was held, that the son's estate belonged to the administrators of the father, and not to the next of kin to the son. See Reeve on Descents, 57, 71. This court established the same construction upon our statute of distributions, in Griswold *v.* Penniman, 2 Conn. 564. On that point, this decision accords with the principles adopted in the other states in regard to their statutes of distribution, so far as they have come to our knowledge." . . . .

same rule was applied to the share of the widow * in her deceased husband's estate. It was here determined, after a most thorough and patient consideration of the cases bearing * upon the point, that, where the widow of an intestate dies before a distribution of the personal estate of the deceased husband has been made, her personal representatives will be entitled to the distributive share of such estate, which she would have been entitled to receive, if living at the time of the distribution. And in a recent case in Mississippi, it is distinctly held, that the title of the distributee vests at the decease of the intestate, and cannot be affected by subsequent events.[9]

"The question does not appear to have been made in this state upon the construction of our statute of distributions, in respect to the share of the widow in the personal estate of her intestate husband, but only in regard to the shares of his children and kindred; but we can discover no good ground for making any distinction between them as to the time when their shares become vested. On this point, the statute is as explicit in regard to the shares of the former, as of the latter, and no sufficient reasons have been suggested, why a different rule should be adopted between them. The appellants rely mainly on the expression in the commencement of the statute, which provides, that the distribution of one-third part of the personal estate shall be 'to the widow of the intestate, if any there be, forever;' and claim that the phrase, if any there be, relates to the time of distribution, and not to the intestate's death. This would be a forced and unnatural construction. The meaning of that phrase is, in our opinion, clearly the same as if it had been in more lengthened phrase, if the intestate left any wife at his decease. The expression was not added for the purpose of qualifying the preceding part of the sentence in regard to the time when it should take effect, or of varying the effect of the provision for the benefit of the widow; since, in regard to her, the phrase would be superfluous, as the import of that provision would be the same if that phrase were omitted, in which case, if the intestate left no widow, the provision for her would have * been simply ineffectual; but it was inserted with reference to the provisions subsequently made in the act in favor of those to whom the estate is given, in case of no widow being left by the intestate. This form of expression was adopted, like several others of a similar character and import, in subsequent parts of the act, as introductory to the provisions for the disposition of the estate, in the event that there should be no such persons living, at the death of the intestate, as those to whom the estate had been before given by the act. It was the design of the act to provide for the distribution of all the intestate estate, and hence it was necessary to use such alternative expressions as would designate who should be entitled to it, on the contingency, that those should not be living to whom it was intended that it should first be distributed. Discarding the phrase in question, as not preventing the vesting of the widow's share immediately on the death of her husband, the language of the provision in her favor is left precisely like that in favor of his children and other kindred, and should receive the same construction."

[9] Thompson *v.* Thomas, 30 Miss. 152.

6. And the same principle has been repeatedly recognized in the courts of Massachusetts. It was there expressly decided, that where the widow of a deceased husband married again, and died before the actual distribution of the estate, she had, nevertheless, such a vested interest in the personal estate of her former husband, that her last husband may claim the property after the decree of distribution, and if she die, he not having reduced it to possession, it will go to her administrator.[10] The rule of law is thus stated by *Shaw*, Ch. J., in another case:[11] "It is a well established rule of law, that the right to a * distributive share of personal estate, under the statute of distributions, is a vested interest, vesting, in point of right, at the time of the deceased of the intestate, although the persons to take, and the amount to be received, must be ascertained and determined by a decree of the probate court, which, from various causes affecting the settlement of the estate, may not be made till long afterwards."[12]

7. But the provision for the widow, by which the judge of probate is empowered to allow part of the personal estate to her for necessaries, is intended for her personal and temporary relief, and does not confer upon her any absolute, or contingent, right of property which will survive her, for the benefit of her personal representatives; and if an appeal is taken from the decree making such allowance, and she dies before such appeal is entered in the appellate court, all further proceedings will be stayed.[13]

8. And the statutory right secured to the widow of a deceased testator to waive the provisions of the will, and claim dower and a share of the personal estate under the statute, is personal to the widow, and cannot be exercised by any one, after her decease, within the time limited.[14]

[10] Foster *v.* Fifield, 20 Pick. 67.

[11] Nickerson *v.* Bowly, 8 Met. 424, 428.

[12] 3 P. Wms. 49, note; Foster *v.* Fifield, 20 Pick. 70; Hayward *v.* Hayward, id. 519.

[13] Adams *v.* Adams, 10 Met. 170. The general principle that the right of the widow or next of kin, to a distributive share in the estate of a deceased person, attaches upon the decease of such person, and that the same will go to the personal representatives of such widow or next of kin, in case of their decease before actual distribution, is recognized in all the American states where the question has arisen. Mills *v.* Marshall, 8 Ind. 54.

[14] Sherman *v.* Newton, 6 Gray, 307.

9. And notwithstanding the general recognition of this rule, in the American states, there seems to have obtained a very extensive opinion, in the courts, and among the profession generally, that the legislatures of the several states possess inherent legislative power to confirm a defective sale of an estate by the * executor or administrator.[15] This power, so far as it exists, must be referred to the power of the legislature to make any alterations which they may deem expedient, in regard to the form of remedies, although it may affect the redress of an infringement of existing and vested rights. And where, in the process of settlement of estates, the property is ordered to be sold, under a decree of the probate court, mere defects in the form of the sale may be supplied by subsequent legislation, without any infringement of the existing rights of any party, since the price stands in the place of the property, and is, in law, regarded as an equivalent. The confirmatory act is therefore nothing more than new provisions in regard to the transfer of property thereafter; and its operation upon a past transaction is effected by the fiction of the law, which regards the repetition of the former ceremony of sale, as idle, and will therefore decree its validity, under the act, the same as if it had occurred subsequently to it. The price, whether going for the benefit of heirs, legatees, or creditors, having come to the hands of the proper trustee, being the executor or administrator, and being retained by him, in effect operates to confirm the defective sale, and is a virtual assent to its validity.[16]

10. But it is proper to guard against any inference, from what is here said, in regard to the power of the legislature to confirm a defective sale under a decree of the probate court, that the legislature possess any power to change, or qualify, the rights of those entitled to the estates of deceased persons, after the descent is cast by the demise of the former owner. There can be no pretence of any such power, as has often been decided.[17]

* [15] Calder *v.* Bull, 3 Dallas, 386. See also, Rice *v.* Parkman, 16 Mass. 326.

[16] Hazard *v.* Martin, 2 Vt. 77; Doolittle *v.* Holton, 26 Vt. 588; s. c. 28 Vt. 819. Price *v.* Huey, 22 Ind. 18.

[17] Bradford *v.* Brooks, 2 Aikens, 284.

*SECTION IV.

GENERAL RULES IN REGARD TO THE CONSTRUCTION OF WILLS.

1. The rules of construction of wills, are less rigid than in regard to other instruments.
2. Courts incline to construe devises so as to give an estate of inheritance.
3. General rules must be adhered to, but they should be a guide to truth, and not to error.
4. A wise and judicious application of general rules, will effect this.
5. Mere analogies never rise above the dignity of assistants.
6. In England, precedents are very numerous and are rigidly applied, so far as they go.
7. But beyond that, the English courts act with great independence.
8. It argues lameness, and defect, somewhere, if cases cannot be governed by truth.
9. Jarman's rules of construction have acquired the weight of authority.
10. Where the will contains inconsistent provisions in the same devise, some must be held void.
11. How far words of reference repeat the effect of former provisions, depends upon circumstances.

n. 6. Mr. Jarman's rules of construction at length, and note to same.

12. Rules in American courts. Words must control.
13. Extraneous facts may aid, but cannot control the construction of words.
14. Every portion of a will must be made to operate, if possible.
15. Transposition allowable to any extent which tends to clear up obscurity.
16. The rules of construction as stated by Strong, J., 19 N. Y. 348.
17. The intention of testator is the object of all constructions. Proper qualifications.
    1. The intention must be expressed in the words of the will.
    2. The general intent, if clear, will control particular terms.
    3. Words are to have that force which authority gives them, unless the contrary is clear.
    4. Clearly expressed intention controls doubtful constructions.
    5. Punctuation is not authoritative in fixing construction.
    6. The will should be upheld and made reasonable; as far as practicable.
    7. Courts will give some meaning to a will, unless absolutely impossible.
18. The children, and their issue, should not be disinherited on any doubtful construction.
19. The court should give effect to all the words of a will, and not violate general intent.
*20. All the papers, constituting the testamentary act, to be considered.
21. The intent to be gathered from the natural import of the words, unless absurd or unintelligible.
22. The technical meaning of words to be followed only where it reaches the intent.

n. 6. Technical construction not applicable to autograph will of an illiterate person. Rules as to general intent, and particular intent, stated in late English case.

23. Rules as to reaching testator's intent, adopted in late English cases.
24. The rule of construction, as declared by Mr. Justice Wilde.

§ 30 *c.* 1. From the earliest periods of the history of the English law, there is manifested a disposition to apply a more favorable construction to wills, than to ordinary legal instruments. And while this has been sometimes regretted,[1] it has, nevertheless, still continued, more or less, to receive the countenance of the courts. And notwithstanding a constant effort in the English courts, to create and maintain clear and definite rules of construction, in regard to wills, it is still the constant confession of the English judges, that these rules, when arbitrarily and unflinchingly followed, often lead one side of the most obvious intent of the testator. There is no better principle in regard to all rules of construction, wherever applied, than to use them as helps and assistants toward reaching the intent of the testator, and to abandon them whenever it is apparent they lead one side of that object; thus making them our servants, rather than our masters.[2]

2. The point, whether the testator is to be regarded as * familiar with the legal import of certain terms of the law, has been considerably discussed, and especially, with reference to estates tail and in fee-simple, where stress is placed upon certain words, and forms of expression, such as "heirs," "heirs of the body," "without issue," "without having, or leaving issue," and some others; and notwithstanding the disposition of the courts to adopt such a construction, as will give an estate of inheritance to the first donee, it is unquestionably true, that in the great majority of cases, where the devise has been cut down, or restricted, to an estate for life, upon the mere ground that no words importing clearly that any larger estate was intended to pass, it has resulted in defeating the intention of the testator.[3]

*[1] Lord *Kenyon*, Ch. J., in Den d. Moor *v.* Mellor, 5 T. R. 558, 561.

[2] Lord *Kenyon's* opinion in Small *v.* Allen, 8 T. R. 497, 502. It has happened, in regard to the wills of some of the most eminent of the English bar, that they have been held absolutely void, for uncertainty. The case of Sir J. Bland is here mentioned by his lordship, and who said at the close of his will, that he had disposed of his estate in so clear a manner, that it was impossible for any lawyer to doubt about it. This will was afterwards contested, and came before Lord *Hardwicke*, who said, that he was so utterly at a loss to conjecture the intention of the testator, that he "wished he *could find some ground on which to found a conjecture.*"

*[3] Seale *v.* Barter, 2 B. & P. 485, 495; Doe d. Lyde *v.* Lyde, 1 T. R. 591, 596; Lord *Thurlow*, Chancellor, in Jones *v.* Morgan, 1 Brown, C. C. 206, 221; Denn, ex dem. *v.* Mellor, 5 T. R. 558, 562; Lord *Mansfield*, in Right *v.* Sidebotham. Doug. 759, 763; Doe d. *v.* Allen, 8 T. R. 497, 502.

3. And it must be remembered, that so long as judicial construction continues to be matter of study and research, and to be regulated by precedent and analogy, it will be found necessary to conform to those rules which the experience of the courts have found to hold true in the majority of instances, and have thus declared as general rules. But at the same time, as all cases are, more or less, affected by facts and circumstances peculiar to themselves, it is seldom that such general rules operate with entire conclusiveness upon any particular case. There is, therefore, in the majority of cases, an opportunity to adapt general rules of construction to the particular circumstances of each case, as it arises. And when it is not found practicable to bring the cause to that result which the particular facts and circumstances seem to indicate, as the most conformable to reason and justice, it is always to be feared, that the comprehension and wisdom of the court fell short of the emergency in which they were placed. We do not desire, by this, to be understood,* as subscribing to the doctrine of some cases, in a strict and literal sense, where it has been said that the intention is the governing principle, "the law" of the instrument, "the pole-star," or "the sovereign guide," and similar forms of expression. These forms of expression sound very well; but they have no precise meaning, or definite force, when attempted to be applied to the subject-matter. General, and clearly established rules of construction must be followed, as much as statutory requirements. And the courts can no more depart from the one than they can dispense with the other, in order to reach the intent of the testator. If the testator uses the words, "personal estate," where he evidently meant to use some other, as "real estate," or "real chattels," the courts can no more depart from the settled import of the words, than they could dispense with the requisite number of witnesses, upon the ground, that by mere mistake, one of the persons present to witness the execution, omitted to affix his name. It can never be the duty of courts, setting aside the lights of all former experience, under similar circumstances, to rush blindly and determinedly toward what they may conjecture, upon certain undefinable, general grounds, might most probably have been the purpose and intention of the testator.[4]

* [4] Lord *Hale*, in King *v.* Melling, 1 Ventris, 231; *Wilmot*, J., in Long *v.* Laming, 2 Burrow, 1100, 1112; the same, in Dodson *v.* Grew, 2 Wilson, 322; 2 Jarman, 761

4. All we intend by what we have so often repeated, in different forms, in the course of this volume, is, that while it is impossible to overestimate the benefits of the long line of judicial decisions, giving construction to instruments, and especially wills, in almost every conceivable state of facts and circumstances, and the aid which they afford to future construction of similar, or analogous cases; and while we are fully sensible of the folly and absurdity of attempting to improve, or modify, and especially to set aside these rules; we by no means admit * that it should be the leading purpose, and most watchful study, of those who are called to fix the construction of testamentary papers, to square them rigidly down to any particular measure of general rules and precedents.

5. Precedents ought never to be allowed an arbitrary and unbending control of any case, not precisely analogous; we might say, not strictly identical. And while all analogies, however remote, must be, and should be, allowed to have their just and proper weight, and the more weight, in proportion to the nearness of the analogy, in determining future cases, we ought never to forget, that mere analogies never rise above the character of assistants. We should not, therefore, allow ourselves to become slaves to them.

6. And having said thus much, we desire also to repeat what we may have said elsewhere, that there is a very marked difference between the testamentary decisions of the English and American courts, in regard to the strict following of general precedents. In a country like that of England, where the amount of hereditary wealth is very large, a great proportion of which is held under testamentary trusts, it could scarcely fail to occur, that a very large proportion of the suits in equity concern the construction of testamentary papers. It of necessity occurs, in the course of centuries, that the precedents accumulate to such an extent, that unless they were very rigidly adhered to, almost infinite confusion must ensue. The English courts have, by consequence, became almost unbending in their adherence to former precedents, where they strictly apply.

7. But, at the same time, when cases occur, as will always be the fact in regard to the largest proportion, which have to be determined upon their peculiar circumstances, the English courts manifest no reluctance to grapple with the difficulties which present themselves, however formidable or embarrassing, and to place all

cases upon their proper basis of truth and justice, without regard to the entire want of precedent to maintain them. It has thus happened, that in the last fifty years, in the English * courts, the proportion of wills, and of bequests, which have been declared void for uncertainty, have been constantly diminishing, until now it has become of very uncommon occurrence, we might say of almost impossible occurrence, unless through some fatal accident, or miscarriage, in the preparation of the instrument. And the same tendency is observable in decisions of the American courts.

8. We always feel that it argues very great lameness in the resources of courts, when a testamentary instrument is entire, and after all the surrounding circumstances, which are admissible in aid of its construction, have been presented, where it is declared that the instrument is absolutely unmeaning, or that any particular portion of it is entirely incomprehensible. And it argues something more discreditable than mere lameness, after all the facts and circumstances are presented, and the necessary and obvious meaning of the instrument is rendered absolutely certain, so much so that no two men could possibly entertain different opinions in regard to it, to refuse to give the instrument its full and legitimate operation, because of the omission of a single word, which is supplied by necessary intendment, or the mistaken collocation of the different members of a sentence. This is something which the English courts seldom do. And it is becoming less common in the American courts.[5]

* 9. We have deemed it proper to insert the general rules of Mr.

*[5] Longstaff *v.* Rennison, 1 Drewry, 28; Parish *v.* Stone, 14 Pick. 198; Loring *v.* Sumner, 23 Pick. 98; Wilbar *v.* Smith, 5 Allen, 194. We often remember the remark of a judge, sitting at Nisi Prius, where the acknowledgment of a deed of land, was, in all respects, in due form, and had been duly registered and acquiesced in for fifty years, except that the word "acknowledge" was unfortunately omitted. The judge very coolly remarked, that "this was a *very important* word!" Truly, and so is the word "promise" in a promissory note, but its omission has been supplied by intendment and construction, and so has a note been held good, when written, "I promise *not* to pay," &c. So, also, the phrase, "with issue," is often construed, "without issue." And there are numerous very recent decisions of the English courts, where it has been held that the omission of any word in a will may be supplied by intendment, where there is no doubt in regard to the word intended to be used. Towns *v.* Wentworth, 11 Moore, P. C. C. 526. But the intendment must be clear beyond all reasonable doubt, so that no two persons could be expected to differ in regard to the word intended. Thompson *v.* Whitelock, 5 Jur. N. S. 991.

Jarman, as found in his last edition, together with the authorities referred to by that author, and his experienced English editors, in support of the rules thus stated. It will not be requisite that we offer any apology for so doing, at the expense of some possible repetition, in our book. The fact of having these rules brought together, in convenient form, where they may all be readily consulted at a glance, will always prove of considerable practical convenience. It is true also, that the general rules for the construction of wills, as drawn up by Mr. Jarman, have, in themselves, acquired, in some degree, the weight of authority. But in common with all general rules, they will be found to call for considerable discretion in their application to particular cases.[6]

[6] English edition of 1861, vol. 2, p. 762 et seq.: —

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England, in which the property is situate, Prec. Ch. 577; but a will of personalty is governed by the lex domicilii.

II. That technical words are not very necessary to give effect to any species of disposition in a will. 3 T. R. 86; 11 East, 246; 16 id. 222.

III. That the construction of a will is the same at law and in equity, 3 P. W. 259; 2 Vesey, 74 (4 Jur. N. S. 625; 27 L. J. Ch. 726); the jurisdiction of each being governed by the nature of the subject, 1 Ves. Jr. 16; 2 id. 417; 4 Vesey, 329; though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period.

V. That the heir is not to be disinherited without an express devise, or necessary implication, Br. Devise, 52; Dyer, 330 b; 2 Stra. 969; Cas. t. Hardw. 142; 1 Wils. 105; Willes, 309; 2 T. R. 209; 2 M. & Sel. 448. See also, 3 B. P. C.; Toml. 45; such implication importing not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. 1 V. & B. 466; 5 T. R. 558; 7 East, 97; 1 B. & P. N. R. 118; 18 Vesey, 40.

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. 4 Beav. 318; (6 Hare, 145). There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail. 9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 6 Vesey, 100, 129; 16 Vesey, 314; 3 M. & Sel. 158; 1 Swanst. 28; 2 Atk. 372; 6 T. R. 314; 2 Taunt. 109; 18 Vesey, 421; 6 Moore, 214; (6 Hare, 492). But see Barnard. C. C. 261.

VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will, see judgment in 16 Vesey, 486; 5 Rep. 68; Cas. t. Talb. 240; 3 B. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; though it may be used to rebut a resulting trust attaching to a legal title created by it, Cas. t. Talb. 78;

*10 But there are many cases where it is impossible to carry the intention of the testator into effect, as where the rules of *law

or to remove a latent ambiguity (arising from words equally descriptive of two or more subjects or objects of gift).

IX. Nor to vary the meaning of words, 4 Taunt. 176; 4 Dow. 65; 3 M. & Sel. 171. But see 2 P. W. 135; and therefore to attach a strained and extraordinary sense to a particular word, an instrument, executed by the testator, in which the same word occurs in that sense, is not admissible, 11 East, 441; but the —

X. Courts will look at the circumstances under which the devisor makes his will, as the state of his property, 1 Mer. 646; 7 Taunt. 105; 1 B. & Ald. 550; 3 B. & Cr. 870; 1 B. C. C. 472; of his family, 3 B. P. C. Toml. 257; 4 Burr. 2165; 4 B. C. C. 441; 3 B. & Ald. 657; 3 Dow, 72; 3 B. & Ald. 632; 2 Moore, 302, and the like. See 5 M. & Well. 367, 368.

XI. That in general, implication is admissible only in the absence of, and not to control, an express disposition. Dyer, 330, b. 8 Rep. 94; 2 Vern. 60; 1 P. W. 54.

XII. That an express and positive devise cannot be controlled by the reason assigned, 16 Ves. 46; or by subsequent ambiguous words, 2 Cl. & Fin. 22; 8 Bligh, N. S. 88; 4 De G. & J. 30; or by inference and argument from other parts of the will, 1 Ves. Jr. 268; 8 Vesey, 42; Cowp. 99; and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference *to, its contents, Moore, 13 pl. 50; 1 And. 8; though recourse may be had to such reference to assist the construction, in case of ambiguity, or doubt.

XIII. That the inconvenience, or absurdity of a devise, is no ground for varying the construction, where the terms of it are unambiguous, 1 Mer. 417; 2 S. & Stu. 295; nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying it. But where the intention is obscured, by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose, 4 Mad. 67. See also, 3 B. C. C. 401; 1 De G. & J. 32; 3 Drew. 724.

XIV. That the rules of construction cannot be strained, to bring a devise within the rules of law, 1 Cox, 324; 2 Mer. 389; 1 J. & W. 31 (8 Hare, 48, 186). But see (12 Sim. 276, and see) 2 R. & My. 306; 2 Kee. 756; 2 Beav. 352; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid, 2 Coll. 336; and therefore the court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void. 3 Burr. 1626; 3 B. P. C.; Toml. 209.

XV. That favor, or disfavor, to the object, ought not to influence the construction. See 4 Vesey, 574. But see 2 V. & B. 269.

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected, 18 Vesey, 466 (4 C. B. N. S. 790); and that other can be ascertained; and they are, in all cases, to receive a construction, which will give to every expression some effect, rather than one that will render any of the expressions inoperative, 3 Ves. 450; 7 id. 458; 7 East, 272; 2 B. & Ald. 441; and of two modes of construction,

under which the testator supposed the different portions of his bequest might take effect, are conflicting, and it is * impossible for

that is to be preferred, which will prevent a total intestacy, Cas. t. Talb. 161; 4 Vesey, 406; 2 Mer. 386.

XVII. That where a testator uses technical words, he is presumed to employ them in their legal sense, Doug. 340; 6 T. R. 352; 4 Vesey, 329; 5 Vesey, 401; unless the context clearly indicates the contrary, Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Ba. & Be. 204; 3 Dow, 71. (See note 1).

XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, 2 Ch. Cas. 169; 6 Doug. 268; 3 Drew. 472; unless a contrary intention appear by the context, or unless the words be applied to a different subject, 1 P. W. 663; 2 Vesey, 616; 5 M. & Sel. 126; 1 V. & B. 260. But see 14 Vesey, 488. And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an * additional meaning, 4 B. C. C. 15; 13 Vesey, 39; 7 Taunt. 85. The writer has heard Lord *Eldon* lay down the rule in these words. But see Amb. 122; 6 Vesey, 300; 10 Vesey, 166; 13 East, 359; 13 Vesey, 476; 19 Vesey, 545; 1 Mer. 20; 3 Mer. 316; where the argument, that the testator, notwithstanding some variation of expression, had the same intention, in several instances prevailed.

XIX. That words and limitations may be transposed, 2 Ch. Cas. 10; Hob. 75; 2 Vesey, 32; Amb. 374; 8 East, 149; 15 East, 309; 1 B. & Ald. 137. But see Vesey, 248; supplied Cro. Car. 185; 7 T. R. 437; 6 East, 486; 2 D. & Ry. 398. See also, 2 Bl. 1014; or rejected, 2 Vesey, 277; 3 T. R. 87 n.; 3 id. 484; 4 Vesey, 51; 5 Vesey, 243; 6 Vesey, 129; 12 East, 515; 9 Vesey, 566; where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. 18 Vesey, 368; 19 id. 652; 2 Mer. 25.

XX. That words which it is obvious are miswritten (as dying with issue for dying without issue), may be corrected. 8 Mod. 59; 5 B. & Ad. 621; 3 Ad. & El. 340. (2 D., M. & G. 300).

XXI. That the construction is not to be varied by events, subsequent to the execution, Cas. t. Talb. 21; 3 P. W. 259; 11 East, 558, n.; 1 Cox, 324; 1 Ves. Jr. 475; but the courts in determining the meaning of particular expressions, will look to possible circumstances, in which they might have been called upon to affix a signification to them. 11 Vesey, 457; 6 Vesey, 133.

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention, in regard to both, Cro. Car. 368; Doug. 759; 8 T. R. 64; 1 B. & P. N. R. 335; 9 East, 267; 11 id. 220; 14 Vesey, 364; 4 M. & Sel. 58; 1 Pri. 353; 4 B. & Cr. 667. See also, Godb. 146. There must be an apparent design to connect them, Leon. 57, Cas. t. Hardw. 143; 10 East, 503. This, and the former class of cases, chiefly relate to a question of frequent occurrence; whether words of limitation, preceded by several devises, relate to more than one of those devises.

all those provisions to stand. So where the testator, in limiting an executory devise, or contingent remainder, * includes among the intermediate devisee's grandchildren, even after the decease of the testator, and also provides that the estate should not vest until such grandchildren should severally arrive at twenty-five years of age, thus rendering the devise over void for remoteness. Sir *William Grant*, M. R., held, that it was impossible to exclude the after-born children, and thus uphold the estate, since it could not be known whether the * testator would not have preferred to include the after-born children, and limit the age of vesting to twenty-one years, and thus bring the case within the rule in regard to remoteness. As the devise then was clearly void, as to the after-born grandchildren, it was held void as to all.[7]

XXIII. That where a testator's intention cannot operate to its full extent, it * shall take effect as far as possible, Finch, 139. See also, 4 Vesey, 325; 13 Vesey, 486.

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees, will not be considered, as intended to provide exclusively for lapse, if it admits of any other construction. 2 Atk. 375; 4 Vesey, 418; 4 Vesey, 554; 7 Vesey, 286; 1 V. & B. 422; 1 Pri. 264. See also, 1 Swanst. 161; 2 Ves. Jr. 501; and M'Cle. 168.

Note 1. Rule XVII. There are many late English cases, which seem to adopt the more reasonable construction in regard to technical language, used in a will, that it shall receive either a technical, or popular construction, according to circumstances. It was said, in Jenkins *v.* Hughes, 8 Ho. Ld. Cas. 571, 6 Jur. N. S. 1043, that whether a general intent, or a particular intent, expressed in a will, is to prevail, must depend upon the context of the whole will, in construing which, the words of a technical kind, are not necessarily to receive a technical meaning.

And in Young *v.* Robertson, 4 Macq. H. Lds. Cases, 314, 325; 8 Jur. N. S. 825; the law is thus laid down: The primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can, with propriety, receive it, the natural, ordinary meaning, which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary, and a technical meaning.

In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. Hall *v.* Warren, 9 H. Lds. Cas. 420; 7 Jur. N. S. 1089.

The foregoing decisions have occurred, within the last few months, in the court of last resort, in England, and they seem to us, to evince a determination not to allow technical rules of construction to overbear and break down all the better instincts, and involuntary sentiments, of common sense, and the common experience of mankind, even in the construction of wills, and we hail the omen with no slight gratification (April, 1864).

*[7] Leake *v.* Robinson, 2 Mer. 363, 390. See also, Jee *v.* Audley, 1 Cox, 324;

11. Upon the question of reference, in subsequent bequests in a will, to former provisions, by the words "in like manner," and many analogous forms of expression, it is difficult to define, with much precision, how far the analogy was intended to be carried. Much will depend, in each particular case, upon the nature and the similarity, or contrariety, of the antecedent and subsequent provisions, so that every case will have to be decided a good deal upon its own circumstances.[8]

12. It may be proper here, to allude briefly to some of the more prominent rules of construction, which have been adopted, or followed, in the American courts. And there is none of more universal application, both here and in England, than that the plain and unambiguous words of the will must prevail, and are not to be controlled, or qualified, by any conjectural, or doubtful constructions, growing out of the situation, circumstances, or condition, either of the testator, his property, or family.[9]

13. There is no doubt that a particular construction of words, although somewhat variant from their more natural and obvious import, may be strengthened by reference to such extraneous circumstance.[10] But in general, the state of the testator's family * and property is not a consideration of much weight, in arriving at the proper construction of his will, and cannot have any proper weight, where the language is plain and the meaning obvious.[11]

14. There is, perhaps, no rule of construction of more universal

Routledge *v.* Dorrill, 2 Ves. Jr. 357; Blandford *v.* Thacknell, 2 Ves. Jr. 238, and Wilkinson *v.* Adam, 1 V. &. B. 422, were here cited, in favor of an exclusion of those members of the class, which were incapable of taking in the mode pointed out, but were held inapplicable.

[8] 1 Jarman, 710, and note.

[9] Bunner *v.* Storm, 1 Sandf. Ch. 357; Mann *v.* Mann, 14 Johns. 1; Parsons *v.* Winslow, 6 Mass. 175; Dawes *v.* Swan, 4 id. 208.

[10] *Gardiner*, J., in Wolfe *v.* Van Nostrand, 2 N. Y. 436, 440. But the courts cannot incorporate distinct terms and conditions upon the words of a will, by construction. Leslie *v.* Marshall, 31 Barb. 560.

[11] Williamson *v.* Williamson, 4 Jones, Eq. 281. It is said in Currie *v.* Murphy, 35 Miss. 473, that it is always safest to adhere to the words of the instrument, without looking to extrinsic circumstances, or the amount of the property, or the consequences of a particular construction. But such facts are always admissible in aid of the construction of wills, to the extent of explaining doubts, or removing uncertainties. Goodhue *v.* Clark, 37 N. H. 525; Travis *v.* Morrison, 28 Ala. 494; Successor of Thorame, 12 Louis. Ann. 384; Lowe *v.* Ld. Huntington, 4 Russ. 532, n.; Noel *v.* Noel, 12 Price, 213; Edens *v.* Williams, 3 Murphy, 27.

application to wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.[12]

15. There is no more clearly established rule of construction, as applicable to wills, than that words, or clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator.[13] It is here said, that words and limitations may be transposed, supplied, or rejected. But it must appear, either from the words of the will, or extrinsic proof, admissible in aid of the construction of the words, that the transposition does really bring out the true intent of the testator, and thus render what was before obscure, clear.[14] For if the transposition leave the same uncertainty, only giving a different import, it is not allowable. But where it gives effect to all the provisions of the will, and renders them all harmonious and consistent, both with each other and with the general purpose and intent of the will, it affords very satisfactory * ground of presumption, that it reaches the source of the difficulty, and explains the mode in which it arose.[15]

16. In a recent case in the New York Court of Appeals, *Strong*, J., states the leading doctrines applicable to the construction of wills, in a very clear and forcible manner; as that the language used shall receive its ordinary interpretation, except where some other is necessarily or clearly indicated; and where words are equivocal, that meaning shall be adopted, which will tend to preserve consistency, in preference to one which would create inconsis-

[12] *Denio*, J., in Norris *v.* Beyea, 13 N. Y. 273, 283.

[13] Pond *v.* Bergh, 10 Paige, 140.

[14] Ex parte Hornby, 2 Bradf. Sur. Rep. 420; Rathbone *v.* Dychman, 3 Paige, 9.

* [15] Hyatt *v.* Pugsley, 23 Barb. 285; Simpson *v.* Smith, 1 Sneed, 394. It may seem to the student, and those who have not had much experience, in the practical application of the rule, in regard to the transposition of words and paragraphs, or sentences, in a will, that it would be attended with difficulty, to determine the precise limits to which it is allowable, in any such manner, as to be incapable of abuse. But when it is remembered, that the transposition must give effect to every part of the instrument, and must clearly tend to explain and remove uncertainties, there will not be much difficulty in the application of the rule. It will commonly produce such an obvious and unquestionable change, in the clearness and simplicity of the will, as to leave no room for doubt, in the mind of any disinterested observer. And unless it does produce some very manifest aid in rendering the whole will intelligible, and consistent, courts will not, commonly, resort to it.

tency; and if possible, some effect shall be given to each distinct provision of the will, rather than it should be annihilated.[16]

17. All the books which treat of the construction of wills, constantly repeat the formula, that the intention of the testator is the prevailing consideration in applying all rules of construction. This will be found repeated, an infinite number of times, in the American reports. But it could answer no good purpose to repeat the dicta, or to refer to the cases where they occur. The most we could do, in regard to that point, is to refer to some few cases, where this proposition has been stated with the * most pertinent qualifications; for it is the legitimate qualification of such a general rule, which becomes the most important to be known, and the most difficult to define.

1. The first and universal qualification of this rule is, that it is the intention of the testator, expressed in his will, which is to govern; and this must be judged of, exclusively, by the words of the instrument, as applied to the subject-matter, and the surrounding circumstances.[17]

2. Where the general intent of the testator is clear, and it is impracticable to give effect to all the language of the instrument, expressive of some particular, or special intent, the latter must yield to the former,[18] but every expressed intent of the testator, must be carried out where it can be.[18] And the general intent overrides all

[16] Chrystie *v.* Phyfe, 19, N. Y. 344, 348; Hone *v.* Van Schaick, 3 id. 538; s. c. 3 Barb. Ch. 488; Sherwood *v.* Sherwood, 3 Bradf. Sur. Rep. 230; De Nottbeck *v.* Astor, 16 Barb. 412; s. c. 13 N. Y. 98.

[17] Chrystie *v.* Phyfe, 19 N. Y. 344, 348; Arcularius *v.* Geisenhainer, 3 Bradf. Sur. Rep. 64; Jackson *v.* Laquere, 5 Cow. 221. In Sherry *v.* Lozier, 1 Bradf. Sur. Rep. 437, 446, it is said, by the surrogate, that "sailors' wills have been considered, in some respects, exceptions to the rules applicable to ordinary cases, not, indeed, in the words of Sir *John Nicholl*, 'exceptions to the great fundamental principles of all testamentary dispositions, *the intention of the testator*, but to some of the rules and presumptions, by which the real intention is to be *ascertained*.'"

[18] Parks *v.* Parks, 9 Paige, 107; Hitchcock *v.* Hitchcock, 35 Penn. St. 393; Purnell *v.* Dudley, 4 Jones, Eq. 203; Workman *v.* Cannon, 5 Harring. 91. This rule is now clearly established, both in the English and American courts. Jesson *v.* Wright, 2 Bligh, 56. And it makes no difference whether the general, or the particular intent, is first stated in the will. Jesson *v.* Wright, supra; Doe *v.* Harvey, 4 B. & C. 620; Hawley *v.* Northampton, 8 Mass. 3; Cook *v.* Holmes, 11 Mass. 528; Chase *v.* Lockerman, 11 Gill &. J. 185; Land *v.* Otley, 4 Rand. 213; Reno *v.* Davis, 4 Hen. & Munf. 283; Den *v.* McMurtrie, 3 Green, 276.

mere technical and grammatical rules of construction.[19] But the court cannot remodel the will in order to meet a contingency not in the mind of the testator.[20]

* 3. In seeking for the expressed intention of the testator, his words are to receive that construction and interpretation, which a long series of decisions has attached to them, unless it is very certain they were used in a different sense.[21]

4. A clearly expressed intention, in one portion of the will, is not to yield to a doubtful construction, in any other portion of the instrument.[21]

5. It is a settled rule, too, in the construction of wills, that the existing punctuation, is not to be regarded, if any change in that respect will tend to bring out and render the meaning of the instrument more obvious and unquestionable.[22]

6. It is no valid objection to carrying out the obvious intention of the testator, if it be not illegal, or against good morals,[23] that it is strange, or unnatural, or absurd. But such a construction will, if possible, be adopted, as will uphold the will,[24] and bring it as near reason and good sense as practicable.

7. And the court will give some meaning to the instrument, if any can fairly be gathered from its words, with every allowable aid to construction.[25]

18. Some of the American cases allude to the familiar rule, that the heir is not to be disinherited, unless the intent to do so is very clearly expressed.[26] And the same rule, in America, * will apply to all the heirs of the testator, unless more remote than children and their issue, or representatives.[27]

[19] Sorsby *v.* Vance, 36 Miss. 564; Rose *v.* McHose's Ex'rs, 26 Mo. (Jones), * 590; Parks *v.* Parks, 9 Paige, 107; Jackson *v.* Housel, 17 Johns. 281. When the strict technical and grammatical meaning of words will tend to defeat the obvious intent of the testator, it is allowable to give them a liberal, or popular, meaning. De Kay *v.* Irving, 5 Denio, 646; s. c. 9 Paige, 521; Burtis *v.* Doughty, 3 Bradf. Sur. Rep. 287.

[20] Lepage *v.* McNamara, 5 Clarke (Iowa), 124; Stokes *v.* Tilly, 1 Stockton 130.

[21] Corrigan *v.* Kiernan, 1 Bradf. Sur. Rep. 208; Brown *v.* Lyon, 6 N. Y. 419.

[22] Arcularius *v.* Geisenhainer, 3 Bradf. Sur. Rep. 64.

[23] Bearley *v.* Bearley, 1 Stockt. 21.

[24] Butler *v.* Butler, 3 Barb. Ch. 304; Griffen *v.* Ford, 1 Bosw. 123.

[25] Wootton *v.* Redd's Ex'rs, 12 Grattan, 196.

[26] Areson *v.* Areson, 3 Den. 458; s. c. 5 Hill, 410; Sherry *v.* Lozier, 1 Bradf. Sur. Rep. 437, 450.

[27] Downing *v.* Bain, 24 Ga. 372; Bender *v.* Dietrick, 7 Watts & Serg. 284.

19. It is said in one case,[28] "It is our duty to give effect to all the words, without rejecting or controlling any of them, if it can be done by a reasonable construction, not inconsistent with the manifest intent of the testator;" and there is, perhaps, no general form of stating this cardinal rule of construction, which is less exceptionable.

20. There is no deviation from the rule, that all the papers which constitute the testamentary act are to be taken together, embracing the will and codicils, and all papers so referred to as to be incorporated with the same.[29]

21. The construction of a will depends upon the intention of the testator, to be ascertained from a full view of every thing contained within "the four corners of the instrument."[30] And the natural construction of the words will be adopted, unless there is such an impracticability of so construing them as to authorize their rejection; or such uncertainty, that no effect can be given to them in that sense.[31]

22. It seems clear, that a technical construction of words and phrases, although prima facie the one which should prevail, will not be carried to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas, and who, from a consciousness of such deficiency, often exert themselves to drag in such phrases, wherever they suppose they would probably have been adopted by an experienced draftsman.[32]

Howard *v.* American Peace Society, 49 Me. R. 288. But where the testator had no inheritable blood and left no heirs, and the question is between the real estate escheating to the state, or going to carry into effect the trusts created by the will, the matter merits a very different consideration. Leigh *v.* Savidge, 1 M'Carter, 124.

[28] Dawes *v.* Swan, 4 Mass. 208, 215; Cook *v.* Holmes, 11 Mass. 528; Hall *v.* Chaffee, 14 N. H. 215.

[29] Westcott *v.* Cady, 5 Johns. Ch. 343; Leavens *v.* Butler, 8 Porter, 380.

[30] Hoxie *v.* Hoxie, 7 Paige, 187, 192. And it makes no difference, if the provisions are plain, whether they be wise or foolish. Manigault *v.* Deas, 1 Bailey, Eq. 298.

[31] Mowatt *v.* Carow, 7 Paige, 328; Chambers *v.* Brailsford, 18 Vesey, 368, 374.

[32] Richardson *v.* Noyes, 2 Mass. 56, 60; Homer *v.* Shelton, 2 Met. 194, 198; Carr *v.* Jeannerett, 2 M'Cord, 66; Carr *v.* Green, id. 75; Brimmer *v.* Sohier, 1 Cush. 118; De Kay *v.* Irving, 5 Denio, 646; Lamb *v.* Lamb, 11 Pick. 375; Inglis *v.* Trustees, 3 Pet. U. S. 113; Finlay *v.* King, 3 Pet. U. S. 346, 377; ante, n. 5; Hill *v.* Spear, 45 Penn. St. 168.

* 23. It has been declared in recent cases, in the English courts, that, in equity, evidence of the intention of the testator, or of mistake in the preparation of the will, will not be received, and an issue will not be directed on that ground to try whether particular restrictive words were, or were not, part of the will.[33] And it was also held, in a very late English case, that although you may not show, by distinct external evidence, what was the skill of the person by whom the will was drawn, you may infer this from the evidence afforded by the will itself, and take it into consideration in construing the will.[34] But evidence of statements made by the testator himself, at the time he executed his will, must be rejected, except in the case of a latent ambiguity, or a resulting trust.[35]

24. The rules of construction of wills are somewhat elaborately discussed by a very learned, experienced, and discreet judge, in the case of Malcolm *v.* Malcolm,[36] upon the question of what words in a will are to have the construction of requiring an indefinite failure of issue, so as to defeat an estate in remainder upon the ground of remoteness. It is here said the intention of the testator is to control, so far as it can be gathered from the will itself, and is not in conflict with the rules of law. And the reporter has extracted the additional canon from the case, that if the testator have expressed two intentions, legally inconsistent, the court will stand in the place of the testator, and give effect to that one which the testator would have preferred, if driven to choose between the two. We do not find this language in the opinion of Mr. Justice *Wilde*, and it seems highly * improbable he should have used precisely that form of language, since it is at variance with the principles of law, and equally with the decided cases. Nothing more is fairly deducible from the opinion, than that the court will place themselves, as far as practicable, in the position of the testator, and give effect to his leading purpose and intention, as indicated by the words of the will, construed with reference to all attending circumstances.

[33] Stanley *v.* Stanley, 2 Johns. & H. 491.

[34] Richards *v.* Davies, 32 L. J. C. P. 3.

[35] M'Clure *v.* Evans, 29 Beav. 422.

[36] 3 Cush. 472. See also, Osborn *v.* Shrieve, 3 Mason, 391; Sisson *v.* Seabury, 1 Summer, 235.

SECTION V.

RULES OF CONSTRUCTION OF WILLS IN COURTS OF EQUITY.

1. Testamentary trusts administered exclusively in equity.
2. The illustrations of equitable constructions as numerous as the cases.
   a. Words, ordinarily, have their natural and popular meaning.
   b. Such a construction is always preferred to any other.
   c. Courts of equity lean towards the plain, natural, and just construction.
   d. and n. 5. The intent of the testator is only to be gathered from such construction of the words of the will; and such circumstances as are admissible in aid.
   e. A familiar illustration is that the word "money" includes stocks, where testator had no money.
   f. The court will not construe the words of a will by mere conjecture.
   g. General words, following those more particular, restricted to matters ejusdem generis.
   h. The construction of wills little aided by cases not entirely analogous.
   n. 10. The application of the rule of limitation of general words, by particular ones, less favored than formerly.

§ 13. 1. We do not intend to imply by the title of this section, that any rules of construction of wills could justly be adopted in courts of equity, which would not equally apply, if the same question arose in a court of law; but we have assumed it merely as a convenient head under which to state some of the more recent rules of construction, which have been adopted by the courts of equity, in declaring the legal effect of wills, as such questions much oftener arise in those courts, than in the * courts of common law, in consequence of the right of an executor, or any other trustee, or even of any of the cestuis que trustent to apply to the courts of equity, to determine the proper course to be pursued in carrying such trusts into effect.[1] In consequence of the very great convenience of this mode of settling the construction of wills, in advance, and thus saving the hazards of litigation, thereafter, this branch of the equity jurisdiction of the courts, in England, has increased to such an extent, as to form one of the most fertile departments of that branch of the law, which occupies so large a force of equity judges in that country. And this branch of equity jurisdiction, in some of the more wealthy and commercial states of

*[1] Treadwell *v.* Cordis, 5 Gray, 341; *Shaw*, Ch. J. 348, Dimmock *v.* Bixby, 20 Pick. 368, Hooper *v.* Hooper, 9 Cush. 127; Bowers *v.* Smith, 10 Paige, 193.

America, is beginning to produce a considerable proportion of the suits upon the equity calendar.

2. The illustrations of construction which courts of equity have adopted, in the case of wills, in order to effect the obvious intention of the testator, by a departure, more or less marked, from the strict, literal and grammatical import of the words, are, of necessity, almost as various as the cases. Some general principles will be found to prevail throughout the cases, so far at least as they may be considered reliable guides.

a. That the words must have their ordinary popular signification, technical terms excepted, unless there is something in the context, or subject-matter, to indicate a different use, and this indication must be clear and unequivocal, in order to prevail.

b. Where the words can have a natural, and also a secondary and unusual interpretation, the former will be preferred.[2]

c. And in construing a will, plain and distinct words are only *to be controlled by words equally plain and distinct.[3] And where the language admits of two constructions—one, reasonable and natural in its direction of property, and the other capricious and inconvenient, courts of justice may naturally be expected to lean toward the former, as being what was probably intended.[4]

d. And while it is of the essence of all rules for the construction of wills, that they aid us in coming at the probable intent of the testator, this intent is only to be gathered from the words found in the instrument, and such as are necessarily supplied by the context. The testimony of the person who drew the will, can never be resorted to, in order to determine the particular intent in the use of particular words, except in the case of a latent ambiguity.[5]

[2] The following cases will illustrate the more recent doctrine which prevails in the courts of equity in regard to the general canons for the construction of wills: Pasmore *v.* Huggins, 21 Beav. 103; Abbott *v.* Middleton, 21 Beav. 143; Hillersdon *v.* Grove, 21 Beav. 518; Circuitt *v.* Perry, 23 Beav. 275; Birds *v.* Askey, 24 Beav. 615; Douglas *v.* Fellows, Kay, 114; Kennedy *v.* Sedgwick, 3 Kay & J. 540; Brown *v.* Hammond, Johns. 210, and cases there cited.

[*3] Goodwin *v.* Finlayson, 25 Beav. 65.

[4] Jenkins *v.* Hughes, 6 Jur. N. S. 1043.

[5] Coffin *v.* Elliott, 9 Rich. Eq. 244. Sir *James Wigram*, in his treatise upon Extrinsic Evidence, has some valuable comments upon this point, p. 85, et seq. Lord Chancellor *Cowper*, in Strode *v.* Russell, 8 Vin. Ab. 194, p. 23; S. C. 2 Vern. 621, seems to suppose that, in conformity with the rule laid down in Cheney's case, 5 Co. Rep. 68, where the words of the will were precisely in

* e. This question may be illustrated by a familiar instance. As a general rule, the word "money" will not include stocks, either in the public funds or private corporations.[6] But where there was no other property upon which it could operate, it was held, that stock in the public funds might pass under the term, "all the money I may die possessed of."[7] Sir *John Romily*, M. R., here said: "Where there is money which can pass under such a gift in a will, it is difficult to extend the meaning of the word beyond it. In these cases, it is solely a question of intention, to be gathered from the language of each particular will. Strictly speaking, stock is not money, but the product of money." And the learned judge here placed some stress upon the fact, that it was not uncommon to speak of stock as so much money in the funds. And a bequest of "all my fortune now standing in the funds," will not pass bank-stock.[8]

f. Where the testator provided portions for his wife, and also for his two daughters, to be determined by a prescribed course of valuation and division, when the youngest child should arrive at the age of twenty-one; and in a codicil directed, that if both his daughters should die in their minority, without issue, the property should go to his wife; and the eldest daughter became twenty-one, but died without issue, and the other died without issue before she

equilibrio, parol evidence might be required to show the intent of the testator in using such words. And Sir *John Strange*, in Hampshire *v.* Peirce, 2 Vesey, 216, declares that parol evidence may be received to *explain*, but not to contradict the words of the will. But *Tracy*, J., who sat with Lord *Cowper*, "was clear that no parol proof ought to have been received according to the rule given in Cheney's case." And Lord *Cowper* himself seems to have admitted the parol evidence de bene esse, saying: "We will consider how far it can be allowed, and how far not, after it is read, and this is not the case of evidence to a jury, who are easily biassed by it, which *this court is not*." And the words of *Parke*, J., as reported in Richardson *v.* Watson, 4 B. & Ad. 787, that evidence might be received to show, that the testator used the word *close* as synonymous with farm, according to the sense which it bore in the county where the land was situated, imports nothing more, than that the meaning of the term might be shown, and how the testator was accustomed to use it. The contemporary report of this case, in 1 Nev. & Man. 575, confirms this view, where it is said, 'evidence of the meaning of the word "close" in the will would have been admissible.

[6] Cowling *v.* Cowling, 26 Beav. 449; Lowe *v.* Thomas, 5 De G., M. & G. 315; Chapman *v.* Reynolds, 6 Jur. N. S. 440.

[7] Chapman *v.* Reynolds, supra.

[8] Slingsby *v.* Grainger, 5 Jur. N. S. 1111; In re Powell, id. 331.

became twenty-one, it was held, that the gift over had failed, the precise state of facts contemplated in the will, upon which it was to take effect, not having occurred. The court say: "It cannot be conjectured what the testator would have done, if the state of things that had happened had been present to his mind. The words that he has used must * be adhered to; and the testator must be taken to have used the word 'minority' in its ordinary sense." [9]

g. It seems to be the general rule, in the courts of equity, in construing wills, that general words, following a specific enumeration, shall be limited in their operation to matters ejusdem generis. It was accordingly held, in a vary recent case, where the authorities are extensively reviewed, that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other goods, chattels, and effects, which shall be in, upon, and about my dwelling-house and premises, at the time of my decease," did not include a sum of money found in the house.[10]

[9] Madison *v.* Chapman, 5 Jur. N. S. 277; Bootle *v.* Scarisbrick, 1 Ho. Lds. Cas. 188.

[10] Gibbs *v.* Lawrence, 7 Jur. N. S. 137. But this rule is subject to a considerable variation, and will not be applied, unless there is a reasonable degree of certainty, that such was the intention of the testator. And where the bequest was to the wife of the testator, of "my pay, clothing, balance of clothing-money, and moneys now due, or that may become due me at my decease; also the whole of my property and effects — that is to say, my box, clothes, bedding," &c., it was held, that the words were sufficiently comprehensive to include the reversionary interest in a large sum in bank-stock, and that the same passed under the bequest. Grover *v.* Davis, 7 Jur. N. S. 399.

The courts of equity, even in England, do not seem disposed to apply the rule, ejusdem generis, with so much strictness as formerly. In the late case of Swinfen *v.* Swinfen, 29 Beav. 207, it was decided, that in a bequest, particularized by one word, followed by general words, the latter was not to be restricted to things ejusdem generis; as where the bequest was "all my estate at S. or thereto adjoining, also all furniture, or other movable goods here," it was held, that the live-stock and implements of husbandry, in and about the premises, passed by the bequest. It was also held, that money in the house, at the time of the testator's death, passed to the legatee. And in a bequest of "all my furniture, plate, books, and other personalty," the general words are not to be confined to things ejusdem generis, but will include a share of the produce of real and personal estate, to which the testator was entitled under the will of his father. Nugee *v.* Chapman, 29 Beav. 290.

A bequest of furniture in a particular house (except plate), will include plated articles in use in the house, the word "plate" meaning solid plate only. Such a bequest embraces only the articles permanently in use in the house. Holder *v.* Ramsbottom, 9 Jur. N. S. 350. A bequest of "all my furniture, linen, plate

* h. We shall have occasion to recur to the general rules of construction, which have been established by the courts in regard to wills, with a view, as far as practicable, to reach the intention of the testator in our discussion of the subject of Legacies and Devises. We may here refer to the language of the Lord Chancellor, in a late case, in regard to the construction of wills: "Upon the construction of wills we are not much assisted by a reference to cases, unless the will, or the words used, are very similar. If this is not so, they are more likely to mislead than to assist, in coming to a correct conclusion. The object of construction is to ascertain the intention of the testator, which is to be collected, not from isolated passages, but from the whole of the will, and the grand scheme and scope of it. And first, what is the ordinary meaning of the expressions used by the testator? If the meaning of the words he has used is clear, they must be adopted, whatever the inclination of the court may be."

pictures, carriages, horses, and other live and dead stock, which may be in my use and possession," at the time of the testator's death, includes wine of the value of £150, and books of the value of £50. Hutchinson *v.* Smith, 8 L. T. N. S. 602. See also, Domville *v.* Taylor, id. 624.

A bequest to testator's widow of "all my real and personal estate," and all estates hereafter acquired, during her life or widowhood; and a subsequent bequest of "all my household furniture, wearing apparel, and all the rest and residue of my personal property," gives the absolute interest only in such property as was of the same kind as furniture, &c., and carries only the income of the productive personal estate, during the widowhood of the legatee. Dole *v.* Johnson, 3 Allen, 364. But in a later case, Browne *v.* Cogswell, 5 Allen, 556, 559, where the bequest was of "all my household furniture, wearing apparel, and all the rest and residue of my personal property, saving and excepting one feather bed," it was held to carry the entire residuum of personal property, and the case of Dole *v.* Johnson was held to rest upon its peculiar circumstances. In the late case of Atkinson *v.* Holtby, 10 House Lords, Cas. 313, it is said, it is not a good rule, in construing a will, to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will.

*SECTION VI.

REPUGNANCY.

1. In cases of irreconcilable repugnancy, the latest portion of the will must stand.
2. But every portion will be upheld, if possible. The order of bequests may be reversed.
3. General words controlled by those more specific.
4. So also of directions in regard to the time of paying legacies.
5. General provisions often depend upon some contingency in the will.
6. Specific devise of an entire thing not qualified by general words following.
7. Repugnant words contravening general intent must be rejected.
8. Unmeaning expressions must be rejected, and defective ones supplied.
9. Words not to be rejected for repugnancy, except from necessity. General rules stated.
10. The natural import of the words not to be departed from, where there is doubt.
11. The reasons assigned will not control the clear import of the words.
12. General remarks in regard to the construction of instruments.
13. Irreconcilable repugnancy cured by rejecting the earlier portions.
14. Further illustrations of incurable repugnancy.
15. From the manner wills are made, courts should preserve more important parts.
16. It is common to transpose portions of wills, to remove repugnancy.
17. No portion of the will is rejected for repugnancy, except from necessity.
18. Directing a legacy to be made a charge on land, not repugnant to subsequent direction for sale of same land.
19. Devise in fee with provision, "never to sell," repugnant.

§ 32. 1. THE general rule, in regard to repugnancy in the different portions of a will, seems to have been established from a very early day; that where there is no fair and reasonable mode of reconciliation, the latest of the contradictory provisions shall prevail.[1] But this rule has not gained universal consent.[2] The more rational, and perhaps the more general * opinion, at the present day, is, that where the same thing is given in the same will to two different persons, they shall take jointly, either as joint tenants, or tenants in common, according to the terms of the devise, or

[1] Co. Litt. 112 b. "Also that in a will where there be diverse devises of the one thing, the last devise taketh place. Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est." Id.; Plowden, 541.

[2] 2 Thomas Coke Litt. 646, n. (12). In regard to this question, Mr. Jarman says, vol. 1, p. 446: "Even here, however, a reconciling construction has been devised, the rule being, in such cases, according to the better opinion, that the devisees take concurrently." 3 Leon. 11, pl. 27; 8 Vin. Ab. Copyh. 152, pl. 3; arg. in Coke *v.* Bullock, Cro. Jac. 49; and in Fane *v.* Fane, 1 Vern. 30.

bequest.[3] But of two inconsistent limitations in a will, the latter must prevail.[4] But in a comparatively recent case,[5] Lord *Brougham*, Chancellor, with his accustomed patience and research, goes through all the cases upon the point, and reaches the conclusion that Lord Coke's rule in regard to invincible repugnancy in wills, is clearly established. His Lordship seems to entertain no doubt, that the reasonable view of the subject "would lead either to the opinion of those who have held, that both clauses are destroyed, or to that which considers both devisees to take equally, on the sounder principle of giving effect, as far as possible, to the whole instrument." We fully concur in his Lordship's suggestions here, as every one must, we think, in regard to the reasonableness of the latter rule of construction, where it can be applied, as in the case of the devise of the same estate to different devisees; and we have no doubt it will generally be recognized as the true rule, and the one established by the authorities, for * the government of cases of this character. But, as well observed by the learned Chancellor, in an after portion of his opinion, that is not a case of clear and irreconcilable repugnancy. But the testator having given the same estate to two or more persons, in different portions of his will, it is the same as if all the names had been united in one gift of the

[3] Lord *Hardwicke*, Chancellor, in Ridout *v.* Pain, 3 Atk. 493. The more general intendment from a joint devise may be, that the devisees take as joint tenants, where all the requisite unities to create such estate exist. 1 Jarman, 446. But as the tendency of modern construction and legislation, especially in America, is toward tenancy in common, where there is no invincible obstacle, we conclude, that all joint bequests and devises will be held to create only tenancies in common, unless the intention to create a joint tenancy is very apparent. And the fact, that the subject is in its nature indivisible, will not, as it seems to us, create any invincible obstacle to this construction. For a horse, or a watch, is as susceptible of ownership by tenancy in common, as grain, or any other species of property. This construction was adopted in McGuire *v.* Evans, 5 Iredell, Eq. 269; Jones's Appeal, 3 Grant, 169. But where the latter devise can be treated as a modification of the former it should be; as where, in the former part of the will, the whole estate is devised to one person, and, in a later portion of it, it is provided, that, upon a given contingency, the same estate shall go to another. Hatfield *v.* Sneden, 42 Barb. 615; Pruden *v.* Pruden, 14 Ohio, N. S. 251; Parker *v.* Parker's Admrs. 13 id. 95.

[4] Wyckham *v.* Wyckham, 18 Vesey, 395, 421; Coryton, *v.* Helyar, 2 Cox, 340, cited 2 Vesey, 195. See also Ulrich *v.* Litchfield, 2 Atk. 372; Sims *v.* Doughty, 5 Vesey, 243; Constantine *v.* Constantine, 6 Vesey, 100; Doe d. *v.* Biggs, 2 Taunt. 109; Chandless *v.* Price, 3 Vesey, 99.

[5] Sherratt *v.* Bentley, 2 My. & Keen, 149.

same estate. But if the case should occur, which is here supposed, of a gift to A in one part of the will, and in an after portion of the will, of the gift of the same estate to B, adding words of exclusion, and "not to A," we could only conclude, that the testator had probably changed his mind.[6]

2. But courts will, if possible, adopt such construction as will uphold all the provisions of the will.[7] And in carrying this purpose into effect, it is permissible to resort to any reasonable intendment.[8] And, if necessary, the relative order of devises or bequests will be reversed, as where an estate is first given in fee to A, and then for life to B.[9]

3. The rule seems to be pretty clearly established, that where the testator makes a general devise, or bequest, which would * include the whole of his estate, and in other portions of the will makes specific dispositions, these shall be regarded as explanations, or exceptions, out of the general disposition ; and it will not be important in such case, whether the general or the special provisions come first in order, since, in either case, the general disposition will be regarded as made subject to the more specific ones.[10] A general

[6] But in the very case where his Lordship went into all this learning, the construction adopted was not based upon the principle discussed, but rather upon the probabilities resulting from the whole case, that the testator used words in defining the estate given in the earlier portion of the will, with the force of which he was not fully acquainted; namely, that adding the words "heirs and assigns forever," created an estate in fee-simple, and left nothing more which could be the subject of devise. The fact, that the testator proceeded very formally to dispose of the remainder of the estate, after the decease of his wife, made it very certain that he had used the former words without knowing their full import, or else that he had changed his mind.

[7] Doe d. *v.* Davies, 4 M. & W. 599. See also, Crossman *v.* Bevan, 27 Beav. 502.

[8] Langham *v.* Sandford, 19 Vesey, 647 ; Shipperdson *v.* Tower, 1 Youg. & C. C. C. 441 ; Briggs *v.* Penny, 3 De G. & S. 539 ; Jackson *v.* Forbes, Taml. 88 ; Brocklebank *v.* Johnson, 20 Beav. 205.

[9] Per *Anderson*, J., in Bennett's Case, Cro. Eliz. 9 ; Ridout *v.* Dowding, 1 Atk. 419 ; Plenty *v.* West, 6 C. B. 201 ; Ustieke *v.* Peters, 4 Kay & J. 437.

[10] Wallop *v.* Darby, Yelv. 209 ; Cuthbert *v.* Lempriere, 3 Maule & Sel. 158. As where the testatrix devised all her real estate at H. to A., specifying the particular kinds ; and afterwards gave all her copyhold estates and hereditaments at N. and S., and *elsewhere*, and it appeared that the only other place where the testatrix had copyholds was at H., Lord *Langdale*, M. R., held, that the former clear devise was not to be controlled by the vague general expression which followed the other devise. Borrell *v.* Haigh, 2 Jur. 229. See also, Sidebotham *v.* Watson, 11 Hare, 170 ; Greenwood *v.* Sutcliffe, 14 C. B. 226 ; Doe d. *v.* Fyldes, 2 Cowp. 834 ;

residuary clause at the end of the will, is commonly construed, as intended for nothing more than a disposition of those portions of the estate which have not already been disposed of. And where nothing remains undisposed of, it will not be held to have any operation.[11]

4. And where the testator provides that certain legacies shall be paid when the legatees marry, or arrive at full age; and then, after giving other legacies, concludes by directing that all the legacies given in the will shall be paid, within one year after his decease, it shall be presumed that this general provision is intended to govern only those legacies in regard to which there is no specific provision as to the time of payment.[12]

5. A general provision following more specific ones, and which, literally construed, essentially qualify or destroy it, will often be rendered entirely consistent with all that precedes it, by holding it dependent upon some contingency named in the will, and upon which it was intended to be made dependent, * but which was not clearly defined, in terms, as where it is provided a second, or after son, shall take the provision made for the oldest son, in case of his decease.[13]

6. And a specific devise of an entire farm, or other estate, is not to be dismembered by a general devise of all the testator's land of a particular description, as "marsh land," although the farm may include a small portion of such land, there being a large estate of marsh land, answering the general devise.[14] And where the testator gave one house in fee to his grand-daughter, and then gave two other houses to the same person, and continued, "the whole of which *premises* are in the borough of Plymouth, during her natural life," it was held, that the life estate was limited to the two latter houses, and did not cut down the fee, in the first house devised, to a life-estate, notwithstanding all the houses were situated in the borough of Plymouth.[15]

7. And it was determined, at an early day, that repugnant words

Ellicombe *v.* Gomperty, 3 My. & Cr. 127; Hillderson *v.* Lowe, 2 Hare, 355; Mortimer *v.* Hartley, 3 De G. & S. 316.

[11] Allum *v.* Fryer, 3 Q. B. 442; Roe d. *v.* Nevill, 11 Q. B. 466.

[12] Adams *v.* Clerke, 9 Mod. 154. See also, Brine *v.* Ferrier, 7 Simons, 549.

[13] Ley *v.* Ley, 2 M. & Gr. 780; Clayton *v.* Lowe, 5 B. & Ald. 636.

[14] Holdfast d. *v.* Pardoe, 2 Wm. Black. 975.

[15] Doe d. *v.* Sloggett, 5 Exch. 107; Bettison *v.* Rickards, 7 Taunt. 105.

in a will, in whatever portion of the instrument they appeared, and which contravened the evident general purpose and intention of the testator, in the other provisions of the will, might be rejected, or transposed.[16] Some of the cases have laid * stress upon the fact, whether a fee is given first, and then words used indicating an expectation that the devisee will only enjoy the use during her life, or the life-estate is first given, and then the tenant for life is given a power to dispose of the remainder. In the former case the courts have, more commonly, held the devise to create a fee, and in the latter, only a life-estate, with power of appointment in regard to the remainder.[17] But it seems to us, these and similar cases must depend upon their own peculiar circumstances.

8. A devise to three persons and their heirs, or the survivor of them, "in the order in which they are now mentioned," creates a clear case of repugnancy. Since it is impossible for two or more persons to take jointly, and in succession, and as it is obvious the testator did intend to create a joint interest, or he would not have used terms so clearly indicating that, and the additional words, in that view, can have no meaning, under any possible conjecture, they must be rejected, as simply unmeaning.[18] And a gift to two, for their joint lives, followed by a gift over, after the decease of

[16] Boon *v.* Cornforth, 2 Vesey, 277; Jones *v.* Price, 11 Simons, 557; Aspinwall *v.* Audus, 7 M. & Gr. 912; Lunn *v.* Osborne, 7 Simons, 56; Croyton *v.* Helyar, 2 Cox, 340; Watlington *v.* Waldron, 4 De G., M. & G. 259; Chapman *v.* Gilbert, id. 366. In Doe d. *v.* Stenlake, 12 East, 515, Lord *Ellenborough* rejected the words, "during their lives," upon the ground that they were evidently introduced by the testator, through ignorance of their legal effect, and with a view to define what he did not comprehend. This will give a wide scope to the courts, by way of construction; but it may sometimes be expedient, and when judiciously exercised, may not be dangerous. But it will not be amiss to reflect, that if such latitude is safe in the hands of some judges, it is no sufficient reason for its adoption, as all general rules are intended for all courts, and will be adopted by all. See also Holliday *v.* Dixon, 27 Ill., 33. In the recent case of Randfield *v.* Randfield, 8 Ho. Lds. Cas. 225, the question of repugnancy is extensively discussed, and the proposition declared, that in applying the rule, that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded.

[*17] Doe d. *v.* Thomas, 3 Ad. & Ellis, 123. See also, Anonymous, 3 Leon. 71; Barker *v.* Barker, 2 Simons, 249; Brocklebank *v.* Johnson, 20 Beav. 205; Pasmore *v.* Huggins, 21 Beav. 103; Reece *v.* Steele, 2 Simons, 233. See also, the late case of Stanley *v.* Stanley, 2 Johns. & H. 491.

[18] Smith *v.* Pybus, 9 Vesey, 566.

both, will be construed the same, as if it had been given during the life of the survivor.[19]

9. It seems to be agreed upon all hands, that words shall not be rejected as repugnant, unless it become impossible to give them any reasonable application to the subject-matter; and then only, when it seems obvious from the context, taking in the entire scope of the will, that such result comes nearest the testator's intention; and that where there seems an invincible repugnancy, and it is impossible to determine which clause the testator did intend to have prevail, other things being precisely equal, the latter clause shall prevail over an earlier one.[20] And in regard to the degree of certainty of intention to be gathered from the will, as applied to the subject-matter, which will justify the rejection of one of two conflicting provisions, no satisfactory universal rule can be laid down. The most which can be said is, that it must be that degree of certainty which satisfies the judicial mind, and which indicates that course, as being the safest, and most likely to effectuate the intention of the testator, all things considered.[21]

10. The general rule deducible from the cases, in regard to departing from the natural import of the words is, that it is not to be done, where there is any doubt in regard to that being the intention of the testator.[22]

11. The rule in regard to the effect, of the reasons assigned, upon the words of a bequest is, that an express bequest, or power, is not controlled by the reason assigned, which, though it may aid the construction of doubtful, cannot warrant the rejection of clear, words.[23]

[19] Townley *v.* Bolton, 1 My. & K. 148. See also, Harvey *v.* Harvey, 5 Beav. 134.

[20] Morrall *v.* Sutton, 4 Beav. 478; s. c. 1 Phillips, 533. See here the very lucid and thorough exposition of the subject, by the conflicting opinions of *Parke*, B., and *Coleridge*, J.

[21] See Chambers *v.* Brailsford, 18 Vesey, 368; Mellish *v.* Mellish, 4 Vesey, 45, 48. In Chambers *v.* Brailsford, supra, the Master of the Rolls, Sir *William Grant*, thus defines the rule, as that which governs the conduct of courts of equity. "The devise, as it stands, is not so insensible or contradictory, as to drive the court to the necessity of expunging or adding words to give it meaning."

[22] Thompson *v.* Whitelock, 5 Jur. N. S. 991.

[23] Cole *v.* Wade, 16 Vesey, 27; Sir *R. P. Arden*, M. R. in Kennell *v.* Abbott, 4 Vesey, 802, 808. By the Civil Law, a false reason given for a legacy is not of itself sufficient to destroy it, unless fraud appears, from which it may be presumed that, if the facts had been known, it would not have been given. Ib.

12. In the construction of all instruments in writing there will arise many discrepancies, and apparent contradictions, * which may be so far explainable, by resort to other portions of the instrument, and the application of the words used to the subject-matter, as to render them reasonably consistent. In such cases, it will always be the duty of courts to give effect to them. And where full effect cannot be given to all such provisions, to carry the same into effect as far as the thing is practicable. And it is generally esteemed a misfortune, and more or less evidence of defect, either in the instrument or the court, or both, where this cannot be done, with reasonable satisfaction to all parties concerned. And the facts of cases are so infinitely diversified, that it would be a foolish conceit to suppose, that any specific rules, beyond those of the most general character, could be laid down in regard to the subject. And it is proverbial, that cases in regard to the construction of wills, depend so much upon the facts, that one is little guide for the decision of others, unless the facts are the same, or nearly so. We shall have occasion to refer to this subject again, under the title of Legacies.

13. The American courts seem to have generally adopted the rule, in the construction of wills, that where there is an irreconcilable repugnancy in the different portions of the instrument, and the difficulty is not relieved by any of the other rules of construction applicable to the case, and both cannot operate, the latest shall prevail over that which is earlier in time.[24] But this rule only applies, as a last resort, and then only to the extent of giving the latter clause its full operation and effect.[25] And in that case only, when the different portions are wholly irreconcilable.[26] It is proper to say, that this rule goes upon the presumption that the testator may have changed his intention * while giving expression to his testamentary dispositions, which is indeed supposable, but highly improbable. The more probable, and just, exposition of the matter is, that having reviewed what he had written, and finding his intent obscure, he may have added, what appears to be his final determination, as a last expression of what he most

* [24] Stickle's App. 29 Penn. St. 234; Evans *v.* Hudson, 6 Ind. 293; Dawes *v.* Swan, 4 Mass. 215; *Parker*, Ch. J., in Braman *v.* Styles, 2 Pick. 460, 463; Bartlett *v.* King, 12 Mass. 542.

[25] Inglehart *v.* Kirwan, 10 Md. 559.

[26] Theo. Seminary, Auburn, *v.* Kellogg, 16 N. Y. 83.

desired. The same rule is applicable to all cases of apparent repugnancy; that which is clearly expressed should be suffered to stand, and that which is more obscure give place; upon the ground that, by so doing, we are more sure to reach the testator's intent, than by any other course.[27]

14. The court is bound to give effect to every word in the will, so far as that can be done, without contravening the general intent, as clearly gathered from the whole instrument.[28] But where this is impracticable, the rule of the last clause controlling earlier ones may come in.[29] But this rule, as has been before stated, and is often repeated by elementary writers and judges, comes in only, after every attempt to give the whole a consistent meaning has failed, and then only, when the earlier and later declarations are equally clear and unquestionable.[30] As where one part of a will gives property to one person, and the same property is subsequently given to another,[31] or where * the testator devises first an undivided part of his real estate, and then empowers the executors, in their discretion, to sell the whole real estate, this latter clause will overrule the former.[32] And the same construction would probably be given to scuh provisions, without regard to the order in which they occur in the will.

15. It is familiar to every one, that persons, not much experienced in drawing wills, often jumble the different provisions together, without much regard to their relative importance in the mind of the testator, or to the consideration how far one of the provisions may be dependent upon another. It is therefore the duty of courts to spell out the probable relative importance of the different

* [27] Redding *v.* Allen, 3 Jones, Eq. 358. See also, upon this general subject, Bradstreet *v.* Clarke, 12 Wend. 602; Bradley *v.* Amidon, 10 Paige, 235, where a later clause was held to be controlled by an earlier one. Sweet *v.* Chase, 2 N. Y. 73; Thrasher *v.* Ingram, 32 Ala. 645; Kane *v.* Astor, 9 N. Y. 113.

[28] Gray *v.* Minnethorpe, 3 Vesey, 105; Constantine *v.* Constantine, 6 Vesey, 102; Homer *v.* Shelton, 2 Met. 202; Lasher *v.* Lasher, 13 Barb. 106.

[29] Homer *v.* Shelton, 2 Met. 202; Pickering *v.* Langdon, 22 Maine, 430; Smith *v.* Bell, 6 Pet. S. C. 68, 84; Bradstreet *v.* Clarke, 12 Wend. 602; Baird *v.* Baird, 7 Ired. Eq. 265; Evans *v.* Hudson, 6 Ind. 293; Miller *v.* Flournoy, 26 Ala. 724.

[30] Covenhoven *v.* Shuler, 2 Paige, 122; Adie *v.* Cornwell, 3 Mon. 279; Lewis's Est. 3 Whart. 162.

[31] Hollins *v.* Coonan, 9 Gill, 62. Ante, pl. 1.

* [32] Pratt *v.* Rice, 7 Cush. 209.

provisions, and how far one was intended to yield to another, when it becomes impracticable to carry all into effect.[33]

16. There are frequent illustrations of the transposition of different provisions in a will, in order that an apparent repugnancy may be removed, to be found in the American, as well as the English reports. As where the testator first devises his land in fee to one person, and subsequently devises the same land for life, to another, the first shall take an estate in remainder, after the termination of the life-estate.[33] And the construction would be the same if the devises were made in the inverse order, since this is the only mode of reconciling the two. Of two repugnant provisions in a will, the courts naturally incline to carry that into effect, which is most suitable, rational, and probable, all things considered.[34] But where the words are clear and distinct, they must be construed in their ordinary sense, notwithstanding the improbability of such construction being the real intention of the testator.[35]

*17. In a recent case in Pennsylvania, it is said, that the rule which sacrifices the former of several contradictory clauses in a will, is never applied, but on the failure of every attempt to give the whole such a construction as renders every part of it effective; the will is to be construed as a whole; and one part is not to be treated as repugnant to another, if it is possible for both to stand. In the attainment of this object, the local order of the limitations is to be disregarded, if it be possible, by transposing them, to deduce a consistent disposition from the entire will.[36]

18. It has been held, that where the testator gives, in one portion of his will, an absolute and unconditional legacy to his wife, to be paid out of the avails of his real estate, and, in a subsequent portion of it, directs his executors to sell his real estate *after the death of his wife*, that there is no such incongruity as will avoid the legacy. The legacy becomes vested at the death of the testator,

[33] Crissman *v.* Crissman, 5 Ired. 498; ante, pl. 2.

[34] Defflis *v.* Goldschmidt, 19 Vesey, 566, 570.

[35] Laroche *v.* Davis, 1 Jur. 574.

[*36] Mütter's estate, 38 Penn. St. 314. This rule is enforced with great strictness in New York, and, as we believe, in most of the American states. So that it is now becoming very uncommon, with us, to hear a court declare a will, or any of its provisions, wholly inoperative, by reason of repugnancy, or uncertainty. Covenhoven *v.* Shuler, 2 Paige, 122; Parks *v.* Parks, 9 id. 107; Sweet *v.* Chase, 2 N. Y. App. 73. See also, Pruden *v.* Pruden, 14 Ohio, N. S. 251; Parker *v.* Parker's Admr, 13 id. 95; Hatfield *v.* Sneden, 42 Barb. 615.

although not payable until after the death of the legatee; and she may dispose of it during her life, or it will go to her personal representative, at her decease, and the payment of it by the executors to the representative of the legatee was decreed.[37]

19. We have had occasion to refer to that species of repugnancy in wills, where an estate, in fee, is first given, and subsequent limitations imposed upon the enjoyment. In a recent case in California,[38] where the testator devised his real estate, upon a particular street, one-third to each of three persons by name, "to have and to hold their lifetime, and then to go to their heirs and assigns, but never to sell," it was held to create a fee simple in the devisees.

SECTION VII.

SUPPLYING WORDS.

1. Words omitted in will may be supplied by intendment.
2. But this not done where there is ground for doubt in regard to the words.
n. 1. Review of the cases upon this point.
3. Words omitted may be supplied by reference to the correlative part of the will.
4. The name of devisee may be supplied by clear intendment.
5. Even the name of the devisee, and the devise itself, may be supplied.
6. Conflicting decisions stated in reference to similar cases.
7. General statement, how far particular circumstances are to be considered.
8. Lord Mansfield in Right *v.* Sidebotham.
9. Terms of one devise cannot be drawn into the construction of another, wholly distinct.
10. The correspondence must amount to identity.
11. Where the defining of the estate is reserved to the end of the clause.
12. The clear intent of the testator gathered from the whole will must prevail.
13. The court will not cut down a devise, in a codicil, by resort to the will.
*14. Where the sections of the will are numerically arranged; each distinct.
15. Recapitulation of the rules deducible from the cases.
16. "Die without issue" construed "without issue living."
17. Almost any latitude of construction allowed, to meet clear intent.
18. Cases where "or" construed "and" too numerous to be quoted.
19. What appears a life-estate may be construed a remainder in fee.

§ 33. 1. It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended to have done, and supposed he had done, and the defect is

[37] Sweet *v.* Chase, 2 N. Y. App. 73; Terrill *v.* The Public Admr. 4 Bradf. Sur. Rep. 245; Arcularius *v.* Geisenhainer, 3 id. 64.

[38] Norris *v.* Hensley, 27 Cal. 439.

produced by the omission of some word, or words; and where it is certain, beyond reasonable doubt, what particular words were thus omitted, they may be supplied by intendment, and the will read, and construed, as if those words had been written in the place, or places, where they were intended to have been.

2. But no word can be thus supplied, so long as there is any fair ground to question what particular words were intended to have been used, which were not. And by this it is meant, that so long as different persons may be supposed to entertain different opinions, in regard to the particular words intended to have been used, or, at least, as to the import of those words, the will must be read as it appears, and the meaning extracted, as it best can be, from what is written. But the fact, that different persons may entertain different opinions, in regard to which of two or more words, of nearly the same import, was omitted in the will, forms no objection to supplying the omission.[1]

*[1] 1 Jarman, 456; Anony. 1 And. 33; Hope *v.* Potter, 3 Kay. & J. 206. See also, Atkins *v.* Atkins, Cro. Eliz. 248. In some cases the terms, "without issue" have been supplied, so as to make a devise for life, read the same as if it had been an estate tail, where it is apparent such was the intention. And in others, "without issue," has been read the same as if it had been written, "without *leaving* issue," in order to bring the remainder within the limitation as to remoteness. Sheppard *v.* Lessingham, Amb. 122.

So also, the words "under twenty-one," will be supplied in a second clause in the will, where these words are contained in the former clause, defining a similar limitation of the same property. Kirkpatrick *v.* Kirkpatrick, 13 Vesey, 476; Wheable *v.* Withers, 16 Simons, 505. But the court will look into all the testamentary papers, and not supply words, fixing a limitation within the prescribed limits, or for any other purpose, where it is apparent such was not the intention of the testator. And to determine this intention, the codicil must be regarded as part of the will, and all their provisions carefully scrutinized. Radley *v.* Lees, 3 Man. & Gran. 827. See also, Radford *v.* Radford, 1 Keen, 486.

So also, "on marriage," was read "on marriage before twenty-one." Lang *v.* Pugh, 1 Yo. & Coll. C. C. 718; King *v.* Cullen, 2 De G. & S. 252; Woodburne *v.* Woodburne, 3 id. 643.

And in Abbott *v.* Middleton, 21 Beav. 143, where a gift over was made by the testator, in the event of his son dying before his mother, it was held, by the Master of the Rolls, that the words, "without leaving a child," should be supplied, as that was the obvious intention of the testator, and this opinion was affirmed, in the House of Lords, Lords *Cranworth* and *Wensleydale* dissenting. 7 Ho. Lds. Cas. 68. See also, Brotherton *v.* Bury, 18 Beav. 65.

The American cases maintain similar views. In Covenhoven *v.* Shuler, 2 Paige, 122, it was held, that where the clear intention of the testator is incorrectly ex-

* 3. And where it is necessary, in order to render an alterative sentence complete, and sensible, and to give effect to the apparent intent of the testator, to add certain words, found in the correlative portion of the will, it should be done.[2] And where an estate is limited to take effect over, upon a condition which * never happens in the terms specified, yet, if the substance of the condition occur, the estate over shall take effect.[3]

4. And where the will, after two bequests to the same person, continues, "I give, further, my yard, stables, cowhouse, and all the other outhouses in the said yard, my sister M. W. to have the interests and profits during her life," although the name of the devisee was wholly omitted, it was readily and clearly supplied by the context, and it was held to create a life-estate in M. W., and a remainder to the devisee next preceding, it being considered, that the word "further," sufficiently indicated, that it was intended merely as an addition to the former devise.[4]

5. And where the testator gave estates in tail male successively to the *second*, and other younger sons of A. B., and on failure of sons, to the daughters of A. B., and provided, that if A. B. should have any children, besides an eldest, or only son, he might raise portions for younger sons, or daughters, the question arose, whether the eldest son of A. B. could take. The question was

pressed, the court will carry it into effect, by supplying words, or by transposing them. See also, Deakins *v.* Hollis, 7 Gill & Johns. 311; Pickering *v.* Langden, 22 Maine, 429. A bequest to the testator's wife, of certain enumerated articles of personalty, "during her natural," was held to create only a life interest, the word "life" being clearly omitted. Geiger *v.* Brown, 4 McCord, 418. The proper rule in supplying words of the testator, is to supply only those which he obviously intended to use, and not such as it may be conjectured will carry out his intention. Lynch *v.* Hill, 6 Munf. 114; Hamilton *v.* Boyles, 1 Brevard, 414. As to supplying words in a devise over, after the decease of the first devisee, without leaving issue, or without issue; see Newton *v.* Griffith, 1 Har. & Gill, 111; Lynch *v.* Hill, supra. And in the recent case of McConey's Ex'r *v.* Leek, 1 McCartee, 70, it is said, conjecture must not be taken for implication. Necessary implication means so strong a probability of intention, that the contrary cannot fairly be imputed to the testator.

[2] Doe d. *v.* Micklem, 6 East. 486. See also, Webb *v.* Hearing, Cro. Jac. 415, where it is said, "and the intention being collected, by the will, the law shall adjudge accordingly."

[*3] Pearsall *v.* Simpson, 15 Vesey, 29; Malim *v.* Kighley, 2 Ves. Jr. 333; Meadows *v.* Parry, 1 Ves. & Beam. 125; Murray *v.* Jones, 2 Ves. & Beam. 318, 320.

[4] Doe d. *v.* Turner, 2 D. & Ry. 398.

referred, first to the judges of the King's Bench, who certified their opinion, that the eldest son took nothing under the will. The question was then referred to the judges of the Common Pleas, who certified that the eldest son "took an estate tail male, under the said will, expectant upon the decease of his father." The question was then argued before Sir *John Leach*, M. R., who said, in giving judgment: "The whole will must be looked through, in order to discover the sense of the testator; and the question is, whether the testator, or the drawer of the will, did not, by mere mistake, omit the word 'first.' I am of opinion it was omitted, by mistake. How is the provision for the daughters, in case there should be no issue male, consistent with no limitation to the first son? It is manifest * the testator did not intend to exclude the first son."[5] And where a devise was made to the eldest and other sons, successively, and the limitation over contains the words, "and likewise the several and respective heirs male of the body and bodies of such *second, third*, or other son, or sons, it was held, nevertheless, that it was so obvious, that the testator must have intended his eldest son to take an estate tail, that the provision in regard to heirs, which was in terms confined to the second and other sons, should, by construction, be extended also to the eldest son.[6] Lord *Mansfield*, in giving judgment here, said: "In the construction of wills it is necessary to avoid two extremes. The first is that of arbitrary conjecture, for

[5] Langston *v.* Pole, 1 Tamlyn, 119. This case was carried by appeal to the House of Lords, and, upon solemn argument, the judgment affirmed upon substantially the same ground. Langston *v.* Langston, 8 Bligh, 167, 2 Cl. & Fin. 194. Lord *Brougham* seems to have been of opinion that the expression, "other sons," included the eldest son, and there was, therefore, no occasion to supply any words, but other cases of similar character do not seem to have favored this construction of his lordship.

[6] Clements *v.* Paske, 3 Doug. 384. And the same rule, substantially, has been applied to the construction of deeds. Owen *v.* Smyth, 2 Hen. Bl. 594. *Eyre*, Ch. J., here said, the case contained "demonstration plain on the face of the feofment, that it was the intent of the parties that an estate tail should" be created in the eldest son. And still his lordship adds, that the words used with reference to his eldest son were not sufficient for that purpose, but considers the words "every such son," used evidently with reference to the second and younger sons, as capable of including all the sons named before. "But no man can read this deed," says his lordship, "without seeing the intent I have mentioned, though by some strange blunder the usual words are omitted." "I, for one, adhere to the rule which forbids the raising estates, by implications, in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds, as we do in wills." See also, Doe d. *v.* Martin, 4 T. R. 39.

the court cannot make a will; the second, that of strictness, which in consequence of a slip in technical, or positive expression, may prevent a meaning evident, and such as no man can doubt, from taking effect." His * lordship also places stress upon the fact, that the will was, in strict settlement, a form well known and always the same, and that the will was copied from a former will; and particular stress is laid also upon the word "likewise," as applied to the "second" son, indicating that the testator intended to extend the same provision to the second, and other sons, which he supposed he already had done to the eldest son.

6. But a in later case,[7] where the facts were very similar, and the omission to name the heirs of the body of the elder son equally obvious, the court declined to supply the words. The Vice-Chancellor, Sir *Lancelot Shadwell*, said: "It is very probable, that the words of limitation have been unintentionally omitted, after the gift to the first son; but, nevertheless, I cannot supply them; I must construe the will as I find it." But this decision is opposed to that of the Court of Common Pleas, in Galley *v.* Barrington,[8] and Doe d. *v.* Taylor,[9] which was a case upon the same will, and the court held the opposite doctrine. Lord *Denman* here said, "I certainly think we are bound to hold, with reference to the intention of the testator, as manifesting itself upon the whole instrument, that his grandson, John, took an estate tail. The case is like Evans *v.* Astley,[10] and is almost identical with Clements *v.* Paske.[11] I confess I think it may be dangerous to speculate, as Lord *Mansfield* appears to have done in those cases, whether any, and what slips, may have been made, in copying. I think it better to construe a will as it is, and to assume that it is as it was intended to be."

7. This latter suggestion is one that seems to have prevailed in the English courts, more generally of late, than formerly, and less in the American states than in England. The old idea of * construing each particular will, according to the probable intent of the testator, without much reference to general rules of construction, is one more likely to find favor in states where few such cases occur, and the courts have ample leisure to speculate, than where

[7] Barnacle *v.* Nightingale, 14 Simons, 456.
[8] 2 Bing. 387.
[9] 10 Q. B. 718.
[10] 3 Burrow, 1570.
[11] 3 Doug. 384.

greater interests are involved, and all cases, from their great numbers, come to be viewed, apart from any considerations affecting the parties, or their friends. But making all due allowance, on that account, it will nevertheless occur, very frequently, and to a certain extent, in almost every case, that something is due to the consideration of the circumstances affecting the particular cause; and those judges who lay aside a too strict adherence to technicalities, while they assume more responsibility, will, in the greater number of cases, effect the more perfect justice. It will thus happen, unquestionably, that eminent judicial talents will sometimes seem to have broken down the established landmarks of the law, but, upon the whole, it will more generally appear, in the end, that they were only acting upon the more perfect comprehension of an imperfectly developed principle, which, in the next age, perhaps, becomes so familiar as to excite no surprise.[12] These cases seem to have proceeded upon the ground, that kindred forms of expression, in regard to different devisees, standing in the same relation to the testator, where some portions of the words had failed to be repeated in regard to some of the devisees, should be supplied by intendment, upon Lord *Hale's* maxim, *noscitur a sociis*. But this rule will not be acted upon, except where it is very clear it was the intention of the testator to create the same * estate by all the kindred devises. And where the last devise is, in terms, clearly different from the preceding ones, there will not be the same ground to infer the identity of intention, as where the variation is in regard to some of the earlier devises, it being more common to omit something in regard to the first-named devisees, intending to supply it, by general words thereafter, as applicable to all the preceding devises, than to expect a preceding provision to be extended to devisees thereafter named.[13]

* [12] These views, we think, apply with some force to Lord *Mansfield* and Chief Justice *Parsons*. But on the other hand, such men as *Eldon* and *Kent*, who were better lawyers, perhaps, made no innovations and no advances. Both classes of judges are indispensable; the one to prevent inconsiderate haste in improving the law, and the other to secure the proper advance, in the right direction.

* [13] Spirt *v.* Bence, Cro. Car. 368; Hay *v.* Earl of Coventry, 3 T. R. 83. Lord *Kenyon*, Ch. J., here said: "The general rule . . . on which alone we can with any safety proceed, in the decision of questions of this kind, is to collect the testator's intention, from the words which he has used in his will, and not from conjecture." . . . "we must collect the meaning of the testator from words which he has used, and cannot add words which he has not used. The objection then

8. And where the testator devised to his wife, "*her heirs and assigns forever*," all his lands at B, and also devised to his wife, all his lands at C," it was held, the latter devise only created an estate for life. Lord *Mansfield* said: "I verily believe, that in almost every case, where by law a general devise of lands is reduced to an estate for life, the intention of the testator is thwarted," for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. "All my estate," or "all my interest," will do; but, all my lands lying in such a place, is not sufficient. Such words are considered merely as descriptive of the local situation, and only carry an * estate for life." [14] And the same rule has been followed in later cases.[15]

occurs in this case, voluit sed non dixit." This is unquestionably a fair statement of the true rule upon the subject. And still no form of expression, which is in common use and perfectly intelligible, is entirely free from ellipsis. The most diffuse style omits many words; and the most perspicuous style is often very elliptical. We must, therefore, supply many words, in all cases. The great difficulty is to discriminate between a mere ellipsis in the language, and the supplying of an entire portion of the will.

* [14] Right d. *v.* Sidebotham, Doug. 759. In the argument of this case, and in many other cases, great stress has been laid upon such general expressions in the will as, "In respect to my worldly estate, wherewith it hath pleased God to bless me," and other similar terms, as indicating an intention not to die intestate, as to any portion of his estate, and as affording reasonable ground to presume that the dispositions made of particular portions of the real estate, were intended to embrace all the testator's interest. In Doe d. *v.* Child, 4 B. & P. 335, 342, Sir *James Mansfield*, Ch. J., places considerable reliance upon similar language. But we apprehend, that in more recent cases, no such ground of presumption has been much resorted to, in determining the construction of wills. Lord *Kenyon*, Ch. J., so declares, in Doe d. Child *v.* Wright, 8 T. R. 64, citing Ibbotson *v.* Beckwith, Cas. temp. Talb. 157: "It is now clearly settled that these words are not, in themselves, sufficient to carry a fee."

The obvious answer to all such arguments is, that the same inference arises from the mere fact of one making a will embracing a general disposition of his estate. It is always, in such cases, fairly presumable that the testator intends to dispose of all his estate. He may nevertheless fail of doing so. And the question is, not what intention the testator entertained, but what he has expressed in the instrument published as his last will. In Wilson *v.* Robinson, 1 Mod. 100, it is said by the court, "By a grant or release of *totum statum suum*, the fee-simple will pass. If the words had been, all my tenant-right lands, it had been otherwise, but the word 'estate' is more than so." And arguendo, it is said, "When a man deviseth all his estate, he leaves nothing in himself."

[15] Doe d. *v.* Wright, supra, Doe d. *v.* Child, supra, where the same will came

9. Where there is no connection in grammatical construction, or by direct words of reference, or the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although, in its general terms and import, similar, and applicable to persons standing in the same degree of relationship to the testator, and there being no apparent reason, * other than the different wording of the clauses, to presume that the testator had a different purpose in view.[16] The testator here divided his farms, in a certain proportion, among his grandchildren, and provided, that as to two of the farms, which were divided among certain of the grandchildren, by name, when any of them married, such ones should receive £10 annually, to be paid by those remaining unmarried. He then gave a third farm to certain others of his grandchildren, in the some manner, except that in regard to the £10, in case either of them married, he only provided such ones should have it, without saying to be paid by the others, remaining unmarried, and the court held that could not be implied, and the £10 must be regarded as a charge upon the land, which fell to the share of such person before marriage, and which would remain a charge upon it, in the hands of the heir at law.

10. A devise in these terms, "I give to A my farm and lands at R, to him, his heirs and assigns forever, and I also give to A my

under consideration in different courts. In the former case, Lord *Kenyon*, Ch. J., took the distinction above alluded to by Lord *Mansfield*, between giving all my *estate*, in lands described, and giving the lands, that the former would, in a will, convey an estate of inheritance, while the latter would not.

*[16] Compton *v.* Compton, 9 East, 267. Lord *Ellenborough*, Ch. J., here said: "From a testator having given persons in a certain degree of relationship to him a fee-simple in a certain farm, no conclusion which can be relied on can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm." "Though he may have varied his phrase, or expressed himself imperfectly, the court cannot go into one part of the will, to determine the meaning of another, *perfect in itself* and *without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding a more probable disposition for the testator to have made may be collected from such assisted construction. . . . Where the words of two devises are different, the more natural conclusion is, that his expressions are varied, they were altered because his intention in both cases was not the same." . . . "If a devise be in these words, 'I devise Blackacre to J. S., then I devise Whiteacre to J. S. and his heirs,' per *Coke*, Ch. J., this is only an estate for life in Blackacre, for the item has no dependence on the first clause, but is distinct and several." 1 Roll. Rep. 369, pl. 23.

farm and manor of E," will create a life-estate only in the latter. Lord *Eldon*, Chancellor, said: "The only question . . . is, whether the word 'also' has precisely the same operation as * the addition of the word 'heirs and assigns forever.'" His lordship came to the opposite conclusion.[17]

11. Where it appears, that the testator first defines the persons and property which were the subject of the devise, and waits till the end of the paragraph to point out the estate devised, that will extend to all the devises in that particular paragraph of the will.[18] "The word 'item' shows, that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is plain."[19] Under a devise of the testator's house at A. (he having two others, at different places), and certain personal estate, in and about the place at A., "and also my household goods and furniture, pictures, plate, linen, china, liquors of all sorts, and brewing vessels, and likewise my watches and personal ornaments, it was held, that the household goods, furniture, &c., at both the other houses, passed by the bequest.[20] And where the testator, among several gifts of sums of £500 each to his grand nephews and nieces, some of which were to be sunk in annuities for life, gave £300 to Joseph Walker, "annuity for life," —— "Martha —— £300 an annuity for life," it was held, that these persons were each entitled to an annuity for life of £300, and that the court could not resort to the context of the will, in search of the meaning of the words of a particular clause, unless it is fully satisfied that the meaning is different from that which the words naturally import.[21] The court cannot be governed, in the

[17] Paice *v.* Archbishop of C. 14 Vesey, 364, 369; Doe d. *v.* Pearce, 1 Price, 353.

[18] Fenny *v.* Ewstace, 4 M. & S. 58.

[19] *Bayley*, J. in Doe d. *v.* Westley, 4 B. & Cr. 667. See also, Gower *v.* Towers, 26 Beav. 81; Hopewell *v.* Ackland, 1 Salk. 239. As to the force of the word "likewise," see Paylor *v.* Pegg, 24 Beav. 105.

[20] Willis *v.* Curtois, 1 Beav. 189.

[21] Walker *v.* Tipping, 9 Hare, 800. Lord *Alvanley*, in Mellish *v.* Mellish, 4 Vesey, 45, 48, thus defines the degree of certainty, which will allow the court to reject a word from the will, upon the ground, that it had crept in by mere mistake: "I really believe it was so, but I dare not, as a judge, take upon myself to say this word cannot be reconciled with the rest of the will." And his lordship adds, in regard to alleged mistakes or omissions in wills, "all the court has to do,

construction of the will, merely by the connection of the parties.[22]

* 12. It has been often held, that where the intention of the testator is apparent, upon the whole will taken together, the court must give such a construction, as will support the intent, even against strict grammatical construction of the words. And to effect this evident intention, as before stated, words and limitations may be transposed, supplied, or rejected.[23] The testator's intention is to be ascertained from the whole will taken together, and not from the language of any particular provision, or clause, taken by itself.[24] The testator will be presumed to have used words in his will, in their primary and ordinary signification, unless from the context, or by reference to extrinsic circumstances, it is evident he intended to use them in some secondary, or other sense, and where the primary signification of the words would render the provisions of the will insensible, absurd, or inoperative.[25]

13. Where an estate tail is given, by a codicil, the court will not resort to the will to alter and cut down the devise, contained in the codicil, even where the testator directs the codicil to be made part of the will, and the same devisee is named in the will, with reference to the same property.[26]

14. Where the will is arranged under different sections, designated numerically, as "*First;* 2dly ; 3dly ;" and in the last clause come these words, "I give to J. C. all my houses and premises * at P. I also give to J. C. all that my land at P. and R. to him, his heirs and assigns forever," it was held, that J. C. took a fee in the house and premises, as well as in the land. Lord *Ellenborough*, Ch. J., said, that each division was to be considered by itself, and as entire in itself, and that words, at the close of one of these divisions, might be applied to all the devises to the person named in that division.[27]

is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission." "Upon the whole, the question is, whether there is a clear, demonstrable mistake."

[22] Sir *G. Turner*, V. C., in Walker *v.* Tipping, supra.

[23] Pond *v.* Bergh, 10 Paige, 140.

[24] Hone *v.* Van Schaick, 3 Barb. Ch. 488.

[25] Cromer *v.* Pinckney, 3 Barb. Ch. 466.

[26] Biss *v.* Smith, 2 H. & Norman, 105.

[27] Fenny d. *v.* Ewstace, 4 M. & S. 58.

15. The result of all the cases, in regard to supplying words, seems to be, that it cannot be done, unless it is clear there has been an omission, and also clear what that precise omission was. And the doctrine of the later and best considered cases is, that the omission cannot be supplied, unless the order of the different portions of the instrument, the collocation of the sentences, or something else, in the grammatical construction, affords a clear and satisfactory ground, of presuming precisely what implication is to be made. In other words, that you cannot, by mere construction, incorporate distinct provisions into the will, however certain it may be, that they were omitted by mistake; but the defects to be supplied by construction must be such as necessarily suggest themselves, from the words used, as the only reasonable and sensible meaning, fairly deducible from the whole instrument.

16. The cases in the American courts, where words have been supplied, or changed, are so numerous, and follow so closely in the track of the English decisions, that we should not be justified in discussing them in detail. "Die without issue," is often read "Die without leaving issue," or "without issue living," in the American courts.[28]

17. In order to reach the obvious general intent of the testator, implications may supply verbal omissions, and all inaccuracies of grammar, or impropriety in the use of terms, may be corrected, if the general purport of the instrument be clear * and manifest.[29] And words may be supplied, where the sense of the clause, as collected from the context, plainly requires it.[30] So words may be supplied, and the grammatical construction disregarded, in order to conform to the clear intent of the testator, as indicated by the whole will.[31]

18. The cases in the American reports, where "or" is construed "and," and vice versa, are so numerous, that it would be a waste of time to state them at length, as each case depends mainly upon its own peculiar facts, and will not therefore afford much guide to the decision of any other. And we shall recur to the subject hereafter.[32]

[28] Moseby *v.* Corbin, 3 A. K. Marsh. 289; Holms *v.* Williams, 1 Root, 332.

[29] Den *v.* McMurtrie, 3 Green, 276.

[30] Dew *v.* Barnes, 1 Jones, Eq. 149.

[31] Reid *v.* Hancock, 10 Humph. 368; Judy *v.* Williams, 2 Carter, 449; Jainson's App., 1 Mann, 99; 2 Wms. Exrs. by Fish, 978.

[32] Post, § 35; Butterfield *v.* Hoskins, 33 Maine, 393; 2 Wms. Exrs. by Fish,

19. It is very common to construe what seems a life-estate, in terms, to create a fee in remainder, because of a prior life-estate having been expressly created, in another, in regard to the same property, as where the testator gave a portion of his estate to his wife, and then gave to his son his house, barn, and warehouse, "after the decease of my well-beloved wife," it was held to create a fee in the son, it being evident, from the whole will, that the testator must have intended to benefit the son beyond the mere right of enjoying the use of the premises during his life, after the decease of his wife.[33] And where it is apparent, from some of the provisions of the will, that other corresponding provisions must have been intended, the courts will supply such portions of the instrument as appear obviously indispensable to carry out the clear intention of the testator.[34] * But, as we said at the beginning, courts will supply only such words, as it is clear it was the intention of the testator to use, and not such as appear to be requisite to carry into effect the probable intention of the testator.[35]

SECTION VIII.

TRANSPOSITION OF WORDS.

1. Allowed, to render will clear, but not, to change its natural import.
2. The court may reach the obvious intent of the testator, where it can be done by transposition.
3. The absurdity or unreasonableness of its provisions will not defeat a will, if it have any intelligible meaning.
4. Words of local description, applied to one devise, referred to another, and vice versa.
5. Reference to American cases illustrative of the rule.

§ 34. 1. WHERE a clause in a will is insensible, or absurd, and can be rendered sensible, and consistent with the general tenor of

979, and cases cited; Brewer *v.* Opie, 1 Call, 184; Jackson *v.* Blansham, 6 Johns. 55; Bolmes *v.* Holmes, 5 Binn. 252. The same rule is reaffirmed in the late case of Roome *v.* Phillips, 24 N.Y. App. 463.

[33] Butler *v.* Little, 3 Greenl. 239; Cook *v.* Holmes, 11 Mass. 528; post, tit. Legacies.

[34] Rathbone *v.* Dyckman, 3 Paige, 9.

* [35] Ante, n. 1; Creswell *v.* Lawson, 7 Gill & J. 227, where "all two lots" was read "all those two lots."

the will, and with the extraneous circumstances, by transposition, it is generally allowable.[1] But words in a will, that are good sense, are not to be transposed.[2] And in no case, * we apprehend, is a transposition of words allowable in a will, where it apparently changes the intention of the testator, as indicated by the natural import of the words, as arranged in the will, and there is nothing to show that such was not the intent, but only where the meaning is obscure, upon the face of the instrument, and is rendered clear, or more obvious, by such transposition.[3] Here Sir *William Grant*, M. R., said: "In a will it is not important in what order the clauses are arranged." Thus, in a devise of "all his messuage with all lands, &c., thereto belonging, situated in Blithebury, &c., in the occupation of T. W., except Floodgate Meadow," where it appeared the testator had a dwelling-house in Blithebury, with nineteen acres of land adjoining, but only two acres of land in the occupation of T. W., and it was held, that the words "now in the occupation of T. W." might be read, as if immediately following the description of the dwelling-house, to which they were evidently intended to apply.[4]

2. In the case of Doe d. *v.* Allcock,[5] the testator devised all his

[1] East *v.* Cook, 2 Vesey, 30, 32, where it is said, The "order of words in wills not considered, if the intent better answered otherwise." And in Duke of Marlborough *v.* Godolphin, 2 Vesey, 74, it is said: Transposition of words in a will, to make a limitation sensible, but not to let in different legatees. Lord *Hardwicke* here, thus explains the rule: "A court of law, as well as of equity (and a court of equity has no greater latititude in construction of wills, and transposing the words thereof, than a court of law has), will, to make sense of a will, otherwise insensible," and to make it take effect, rather than be totally void, often transpose words, to attain the intent, that on the face of the will, the testator had. Luxford's case, 3 Levinz, 125. See also, Green *v.* Hayman, 2 Ch. Cas. 10; Sparke *v.* Purnell, Hob. 75; Gibson *v.* Lord Montfort, 1 Vesey, 490; Mohun *v.* Mohun, 1 Swanst. 201.

[2] Cole *v.* Rawlinson, 1 Salk. 236.

[*3] Blamire *v.* Geldart, 16 Vesey, 316; Tilly *v.* Smith, 1 Coll. 434; 1 Jarman, 467 and note.

[4] Marshall *v.* Hopkins, 15 East, 309.

[5] 1 B. & Ald. 137. Mr. Jarman criticises this case and the opinion of Lord *Ellenborough*, as departing from the natural meaning of the words, too far. But it is questionable, whether any other construction could have been adopted, which would not have left an intestacy, as to the largest portion of the estate, and rendered the disposition, as far as it went, absurd. The purpose was to give the three a fee-simple in the whole estate, except that the interest of the mother should be limited to her life, and the three devises were combined, to save words,

hereditaments to his sister A. T. and her two daughters, and their heirs and assigns, equally to be divided between them, in common, for and during the life of A. T., and after her death he devised the third part, so devised to his sister for life, to her * two daughters in fee. It was held to give the two daughters a fee-simple in two-thirds, and a remainder in fee of the other third part, after the decease of their mother. Lord *Ellenborough* said, "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered, in such a way, as, if taken in the order in which the stand, they do not convey any meaning, yet in favor of common sense, we may take the liberty of transposing them, according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labor of the argument has been to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas his meaning evidently was, to dispose of the whole."

3. But in the construction of a will, it is not sufficient to avoid the will for uncertainty, if plainly expressed, that the dispositions are so absurd and irrational, that it is difficult to believe they should have been the real intention of the testator. To produce that result, they must be so uncertain, as to be incapable of any clear meaning. Where the dispositions of a will are clearly expressed, it matters not how irrational or inconsistent with the general purposes of the will they may be, they must prevail, if there be no other objection.[6]

4. Where the testator misdescribes his estates, as being in different localities from the fact, putting one estate in the locality of another, and vice versa; it was held, that where sufficient appeared, upon the face of the will, as applied to the subject-matter, to show that such misdescription was a mere mistake, either in the testator,

and the ordinary result followed, of confusion and uncertainty. It seems to us a very just illustration of the power of an experienced and self-relying judge, to extract light out of obscurity, and certainty out of confusion.

[6] Sir *John Leach*, V. C., in Mason *v.* Robinson, 2 Sim. & Stu. 295. See also, Doe. d. *v.* Huthwaite, 8 Taunt. 306; s. c. 3 B. & Ald. 632. This last case we have examined elsewhere; see post, Extrinsic Evidence. See Wootton *v.* Redd, 12 Grattan, 196; Werkhieser *v.* Werkhieser, C. W. & S. 184.

or the person who drew up the will, * that it would not have the effect to defeat the obvious intention of the testator.[7]

5. The transposition of the sentences in a will is allowable, when necessary to express the intention of the testator.[8] And the words of a will may be transposed, in order to make a limitation sensible, or to effectuate the general intention of the testator.[9] And it is here said, that where it is apparent that the real intention of the testator is incorrectly expressed, the court will carry the clear intent into effect, by supplying the proper words. But it seems to be admitted, on all hands, by the most experienced and judicious writers, and judges, that no liberty of transposition, or supplying, of words, is allowable, unless in furtherance of the most unquestionable purpose of the testator. If a doubt arises in regard to any such change advancing the real intent of the testator, it cannot be made.[10] A construction which will render the instrument legal, is preferred.[11] And the whole will must be made to stand together, if possible.[12] Every portion of the will must have its effect, without rejection or change, when it can be done consistently with the obvious general intent.[13] But if requisite, to carry out such obvious general intent, words, or sentences, may be transposed.[14]

*[7] Mosley *v.* Massey, 8 East, 149. This may be regarded, as coming within the principle of the class of cases, where a false description is rejected upon the maxim falsa demonstratio non nocet. But it in fact applies one local description to another devise. See Den *v.* Kemeys, 9 East, 366; post, § 35.

[8] Baker *v.* Pender, 5 Jones, Law, 351.

[9] Covenhoven *v*, Shuler, 2 Paige, 122. See also, Linstead *v.* Green, 2 Md. 82; Walker *v.* Walker, 17 Ala. 396.

[10] Annable *v.* Patch, 3 Pick. 360.

[11] Ante, § 30 *c*, n. 24.

[12] Hunt *v.* Johnson, 10 B. Mon. 342; Bowly *v.* Lammot, 3 Har. & J. 4; Moore *v.* Dudley, 2 Stewart, 170; Williams *v.* Veach, 17 Ohio, 171; Hall *v.* Chaffee, 14 N. H. 215.

[13] Pué *v.* Pue, 1 Md. Decis. Ch. 382.

[14] Linstead *v.* Green, 2 Md. 82.

*SECTION IX.

CHANGING WORDS. — THE CONSTRUCTION OF PARTICULAR WORDS.

1. No word in a will rejected, or changed, except upon the clearest certainty.
2. A mere doubt will not justify such construction.
3. The necessity for such change of words, occurs more commonly in familiar terms.
4. Thus conjunctive words are often read disjunctively, and vice versa.
n. 6. Cases reviewed upon this subject.
5. The same rule extends equally to personalty.
6. And the addition of more terms to the condition, will make no difference.
7. Insuperable difficulty, in classifying the cases upon the point.
8. The grammatical construction explained.
9. The later cases incline to follow the natural import of the words. Cases reviewed.
10. Illustrations of the use of particles in different relations.
11. The latest decision of the court of last resort in England on that point.
12. Statement of the rule as there declared.
13. Further illustration of the subject.
14. Mr. Jarman's rule is that the construction depends upon the preceding gift.
15. Review of Lord Mansfield's commentary upon the question.
16. In bequests to persons *or* their children, "or" construed "and."
17. Devises to one or his heirs, forever, or in tail; proper construction.
18. Devise to one, his heirs, or assigns, creates a fee-simple.
19. Devise to a class, with power of selection, not made, effect of.
20. "And" construed "or" to prevent the divesting of a legacy.
21. The word "and" used disjunctively, by the repetition of the verb.
22. How the words "die unmarried," are to be construed under different circumstances.
23. "Unmarried," designatio personæ. "Still unmarried," is never having been married.
24. Death in the lifetime of A and B, means during their joint lives.
25. The American cases allow of the change of words to carry out the clear intent.

§ 35. 1. It is obvious that no word in a will can be rejected, and another substituted in its place, without the clearest certainty that such was the intention of the testator. If the change is required, to render the act rational and sensible, and there is no proof of want of these qualities in the testator, except the * language of the will, and that is easily remedied, by a slight change in the words, which may be readily and clearly shown to be what was intended; and in regard to which there is no ground for difference of opinion, or for argument, it may be done, by way of construction.[1] As

*[1] Doe d. *v.* Gallini, 3 Ad. & Ellis, 340; s. c. 5 B. & Ad. 621. It was here held, that the terms "without issue," must be understood "leaving issue," and the word "all" must be read "each" or "any." But the necessity of this change was

where the testator's intention evidently appeared to be, to divide his property equally amongst his seven children, and for that purpose he had arranged it upon seven schedules, and subjected it to mortgage debts in such manner, that if in a particular clause the words "fourth schedule" were read literally, the entire plan of the will would be frustrated, and the payment of the debts in the manner provided would become impossible, but if "fourth" were read "fifth," the whole would be rendered consistent and rational; the Court of Appeal in Chancery, did not hesitate to adopt that construction.[2]

2. And where the testator, after giving legacies to his relations, in the former part of his will, made other dispositions, and then gave the residue of his estate, excepting £4,100, which he directed to be divided among his relations to whom he had given legacies in the fore part of his will, "in proportion to the legacies left above, which will just make their legacies double the first bequest." The first legacies amounted to £6,100; and the question was, whether the sum could be so read. The Court of Appeal in Chancery held that it could not.[3] Lord * Justice *Turner* said, "he adopted what was said by Sir *Pepper Arden*, in Mellish *v.* Mellish,[4] that the safest way was, when it came only to a doubt, to adhere to the words."

3. Slight changes in the words, or their collocation, is almost universal in the construction of wills, since very few persons use language with much precision, and even the most correct writers sometimes use familiar forms of expression, with great looseness.[5] The most common illustration of this occurs, probably, in the use

clearly shown by the language of other portions of the will, as read with reference to the general intent shown upon the face of the whole instrument.

[2] Hart *v.* Tulk, 2 De G., M. & G. 300. See also, Phillips *v.* Chamberlaine, 4 Vesey, 50; Bengough *v.* Edridge, 1 Sim. 173; Pasmore *v.* Huggins, 21 Beav. 103.

[3] Thompson *v.* Whitelock, 5 Jur. N. S. 991. The cases were here examined, and the decision placed upon the ground, that there was but a doubt, and no certainty what was the intention of the testator. If £4,100 were read £6,100, there would be as much probability of defeating the intention of the testator, as by reading the will as it was written.

[4] 4 Vesey, 50. In Crooke *v.* De Vandes, 9 Vesey, 197, 205, Lord *Eldon* said, in regard to the construction of a will, "The safest course is to abide by the words, unless upon the whole will there is something amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator."

[5] Woodstock *v.* Shillito, 6 Sim. 416. Joint terms, as it was claimed, were here construed severally.

of the words, "and," "or," and similar terms. It is very common to give conjunctive words a disjunctive force, and vice versa.

4. There is a numerous class of cases, where an estate limited to one, and to pass over, in the event of such person dying before the age of majority or without issue, where it has been long settled, to give "or" the force of "and,"[6] and to hold, that * if the first devisee attain the age limited, the estate becomes absolute in him, and that in order to its passing over, he must die within age and without issue. This rule is said to have been adopted, in order to avoid what the courts esteemed an unreasonable construction.[7] It may be questionable, perhaps, whether, in attempting to frame a discreet provision, they have not often defeated the intent of the will.[8]

[6] Soulle *v.* Gerrard, Cro. Eliz. 525. The devise here was to one of testator's sons, by name, and his heirs forever. But if he "died within the age of one and twenty years, or without issue," then the land to be equally divided among his other sons, and "or" was construed "and;" but although this construction was regarded as necessary, in order to give legal effect to the provisions of the will, under the established refinements, growing out of the old feudal restrictions upon conveyances, it is very questionable whether it did not defeat the intent of the testator in the particular case. And in Brownsword *v.* Edwards, 2 Vesey, 243, Lord *Hardwicke*, in a similar devise, construed "and" as equivalent to "or," in order to reach the obvious intent of the testator. The devise being to trustees, no technical questions arose. This latter case, seems to us one far more worthy to be followed, as tending to effect the intent of the testator, than the next preceding one, but there are numerous other cases, where a limitation to one, and if he die before twenty-one, or without issue, has been held to require both events to concur, in order to pass the estate over. But most of them rest upon special grounds. Barker *v.* Suretees, 2 Strange, 1175; Price *v.* Hunt, Pollexf. 645; Walsh *v.* Peterson, 3 Atk. 193; Framlingham *v.* Brand, id. 390; Burrill *v.* Kemp, 3 T. R. 470; Doe d. *v.* Burnsall, 6 T. R. 34; Fairfield *v.* Mergon, 5 B. & P. 38 (in Dom. Proc.); Eastman *v.* Baker, 1 Taunt. 174; Right *v.* Day, 16 East, 67; Doe d. *v.* Selby, 4 D. & Ry. 608; 2 B. & Cr. 926; Morrall *v.* Sutton, 1 Phillips, 551. The rule is now too firmly established, by decisions quite too numerous, either to be questioned, or to require support from authority.

[7] 1 Jarman, 472.

[8] Thus, in the very recent case of Cooke *v.* Mirehouse, 34 Beavan, 27; where the estate over was made to depend upon the first taker, not living to the age of thirty-one, or not having any son; and it was held, that although he attained the requisite age, but died without having had issue, that "or" could not be read "and," and consequently the estate over took effect. And in another late case, Barker *v.* Young, 33, Beav. 353, where the facts were similar, except that the connecting particle was "and" instead of "or," it was held that it must have its true and natural force, and could not be regarded as equivalent to "or." These but illustrate the manifest disposition of late to escape from that loose mode of con-

5. The same rule of construction extends to devises of personalty, as where the testator bequeathed £5,000 to A, if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over, it was held, that the estate vested absolutely, upon A attaining the age of majority.[9]

6. But where the devise is made dependent upon the condition, that the first devisee shall die under age, unmarried, and without issue, all these events must concur, to defeat the estate.[10] And where the estate is made to depend upon the devisee dying during the lifetime of another, *or* under twenty-one and without leaving issue, the word "or" must be read "and."[11]

* 7. Mr. Jarman, and his editors, in his excellent treatise upon wills, in the latest edition,[12] have devoted a large space to the consideration of this question, when copulative words will be read disjunctively, and the reverse; far more, as it seems to us, than its importance demands. And the attempt there made to classify the cases, under intelligible heads, assigning distinctive reasons for each, seems to have proved all but a failure. The exceptions are so numerous, and the judges agree so little in the reasons assigned for departing from the strict construction of the words of the instrument, that, upon the whole, the cases, and the attempt at classification, rather tend to produce uncertainty and confusion than any thing else. We shall content ourselves by referring to the cases, and stating the results very briefly.

8. Very much depends upon the subject-matter, and whether the natural and literal import of the words can be made to consist with the general purpose of the will. If it can, that course should always be preferred.[13] But a good deal of the confusion in the cases may be explained by considering, that, where all the particulars enumerated depend upon the verb preceding, without implying its repetition, the very form of expression requires that *all* the particulars should concur, before the gift over can take effect.

struction, whereby one word is allowed to assume the place of another, post pl. 11, & notes.

[9] Mytton *v.* Boodle, 6 Simons, 457.

[10] Doe d. *v.* Cooke, 7 East, 269.

[11] Miles *v.* Dyer, 5 Sim. 435; s. c. 8 Simons, 330; Hasker *v.* Sutton, 1 Bing. 500. See also, Read *v.* Snell, 2 Atk. 642; Key *v.* Key, 1 Jur. N. S. 372; 1 Jarman, 473.

[12] London, 1861.

[13] Denn *v.* Kemeys, 9 East, 366; Wright *v.* Kemp, 3 T. R. 470.

Thus in Green *v.* Harvey,[14] the devise was to the testator's son, of leasehold premises and furniture and plate, "and should he die without heir or will," then to others. The strict, literal import of the sentence is, that he must die without heir or will; and to change it into "without heir *and* will" makes simple nonsense, unless we imply the repetition of the preposition before the second particular, and read it, without heir and without will; so that the natural force of the conjunction depends upon the repetition of the preposition. If the preposition * is repeated, before any or all the subsequent particulars, it requires the change of "or" into *and*. This will solve the difficulty in a considerable number of the cases.[15]

9. But a careful examination of the more recent cases upon this point, cannot fail to convince every one that the liberties heretofore taken by the courts, in substituting "and" for "or," and vice versa, especially in the earlier cases, has received very slight encouragement for the last few years. And a considerable number of the earlier cases adopt the same view. We have already adverted to the case of Brownsword *v.* Edwards,[16] where Lord *Hardwicke* adhered to the opposite view, from that maintained in the cases already referred to. His lordship virtually changed "and" into *or*, as has been often said, in order to have the gift over take effect, if the first devisee died, under age, or without leaving issue. It is true this result is escaped, by repeating the verb, thus: If he dies under age, and if he dies without issue, then over. And in Woodward *v.* Glassbrook,[17] Chief Justice *Holt* held, that in a devise to the testator's children in tail, "and if any of them die before twenty-one, or unmarried, such child's part to go to the surviving children," if any of the children die unmarried, though above the age of twenty-one, his share shall go to the survivors, but for life only. And Lord *Ellenborough*, in a later case,[18] takes a similar view, where

[14] 1 Hare, 428.

[15] Beachcroft *v.* Broome, 4 T. R. 441. The preposition "without" is here repeated before the last term in the series, and thereby the *natural* import is reversed. It is very possible such an effect might not be always appreciated by the testator, but, as we have before said, we think it not unlikely it would be, much oftener than courts seem to have supposed. See also, Incorporated Society *v.* Richards, 1 D. & War. 283; Greated *v.* Greated, 26 Beav. 621.

[16] 2 Vesey, 243; ante, n. 6.

[17] 2 Vernon, 388.

[18] Doe d. *v.* Jessep, 12 East, 288. Lord *Ellenborough* here said, after confessing that the authorities come very near the line of reading "and" disjunctively in the

* the devise was to go over in the event of the first donee dying within age *and* unmarried, where it was held, that both events must concur to defeat the estate. In one case,[19] where the question came before Lord *Brougham*, Chancellor, and after a most exhaustive examination of the subject, by the most eminent counsel of the equity bar,[20] his lordship declared, "It must, however, be admitted, that the reading of 'or,' instead of 'and,' is rarely to be found sanctioned by decision. Maberly *v.* Strode,[21] and one or two other cases of the same kind, may be reckoned for nothing, because the words would have been hardly sensible if read in any other way."[22] And in the later case of Mortimer * *v.* Hart-

case: "But is there not a rule of common sense, as strong as any case can be that words in a will are to be construed according to their natural * sense, unless some obvious inconvenience or an incongruity would result from so construing them." His lordship then argues very forcibly and very justly, against the injustice of saying the estate shall pass over on the happening of *one* of the two events, when the testator had said it should only pass over upon the concurrence of the *two*.

[19] Malcolm *v.* Taylor, 2 Russ. & My. 416.

[20] Sir E. Sugden, Mr. Pepys, Mr. Spence, Mr. Preston, and others.

[21] 3 Vesey, 450.

[22] His lordship thus disposed of the subject: "That was a limitation to A for life, and after his death to his children, but in case he died unmarried and without issue, over; if he died unmarried, he must, in contemplation of law, have died without issue. But in Brownsword *v.* Edwards, 2 Ves. Sen. 243, Lord Hardwicke read 'and' as 'or,' to effectuate the intention appearing on the will. The devise there was to trustees to receive the rents till A should attain twenty-one or have issue, and then to A and the heirs of his body, but if he died before twenty-one and without issue, then in trust for B, his sister. A died after twenty-one and without issue; and Lord Hardwicke supported the gift over to the sister by reading 'and' as 'or.' It has been said, and perhaps truly, that Lord Hardwicke would have felt much more repugnance to giving the words this construction had any other event happened. And the Court of King's Bench has certainly gone against, though they cannot be said to have overruled, his decision, in Doe *v.* Jessep, 12 East, 288.

"The reason given by Lord Ellenborough for questioning the case of Brownsword *v.* Edwards, that in a will words are to be taken in their natural sense, is one which all must heartily wish could always be applied and taken as a general canon. But unfortunately it is too late; rules of technical construction are no * longer to be rejected, even in the case of wills; and the utmost that can now be done is to follow the natural sense of the words used in such instruments, wherever those rules will permit us. It may be, I trust it certainly is, going much too far to say, with one of the learned counsel, that no conveyancer can give a safe opinion upon any one case on the law of real property which comes before him in the twenty-four

ley,[23] *Parke*, B., pronounced a very elaborate judgment, wherein he reviews the cases, and his comments are so pertinent that we give them at length: "The next clause creates the great difficulty in the case. 'If it should please God to take both John and Ann under age (that is, under twenty-five), or without leaving lawful issue, I give and bequeath to my brother, Joseph Westerman, and his heirs forever, all those cottages and cart-house, with their appurtenances.' Is the word 'or' to be understood according to its grammatical meaning, or as the copulative 'and'? If the former, these particular lands would go * to Joseph Westerman in fee; if the latter, his remainder would be defeated. If the estate has been given to John and his heirs, &c., there are many cases which show that as in ordinary parlance 'or' is often used for 'and,' and as the issue of John and Ann would be both without a provision if they married and died before twenty-five, 'or' ought certainly to have been construed as 'and,' in order to prevent such a consequence. But here the first gift is of an estate and not a fee, and it is contended for the plaintiff, on the authority of Lord Hardwicke, in the case of Brownsword *v.* Edwards, 2 Ves. Sen. 243, that that circumstance makes a material difference, and that 'or' ought to be read in its ordinary sense. Objections have been taken to the opinion of Lord

hours. Nevertheless, it cannot be denied, that much uncertainty has been introduced into this branch of the law. This is not, however, to be imputed solely to the adoption of technical rules. It has been in part owing to not keeping by the technical rules once introduced. The struggles in favor of intention, sometimes made on the ground of natural meaning, sometimes on the ground of other rules as technical as those striven against, have been a fruitful source of this uncertainty, and in more instances than one a recurrence to the original technical principle has been seen to sweep away a multitude of intermediate decisions, while the new decisions are found to leave unsettled almost as much as they have fixed.

"Against the construction now given to this part of the will, it is needless to say that objections may be raised from cases which may be put, in which a result would take place most unlike any the testatrix could have thought of. But that is not peculiar to this case; it may be said to happen, and almost of necessity, in every instance where a gift over is frustrated, by being limited on a general failure of issue."

[23] 3 Eng. L. & Eq. 532; s. c. 6 Exchequ. 47; s. c. 3 De G. & Sm. 316. See also, Mortimer *v.* Hartley, 6 C. B. 819, where the same question is examined by the Court of Common Pleas, after the most elaborate argument, and the court held, that the word "or" must have a conjunctive force, requiring both events to concur, in order to have the gift over take effect. But that seems clearly to be the natural import of the words, as argued by *Parke*, B., supra.

Hardwicke, and it has been said that he went so far in this case as to hold that 'and' ought to be changed into 'or' for the purpose of obtaining a result, the opposite of that for which the converse alterations had been made in the cases above referred to. Jarman on Wills, 449; Fearne, 506; Malcolm *v.* Taylor, 2 Russ. & M. 447. In Brownsword *v.* Edwards the estate was devised to trustees till John Brownsword should attain twenty-one, and if he should live to attain twenty-one or have issue, then to John Brownsword and the heirs of his body, but if he should happen to die before twenty-one, *and* without issue, then over. Lord Hardwicke says, 'There is no necessity to alter or supply words, for there is a plain, rational construction upon *the words*, 'if the said John shall happen to die before twenty-one,' *and also*, '*shall happen to die* without issue,' which construction makes the dying without issue to go through the whole, and answers the intent of the testator.' It appears, therefore, to have been a mistake to attribute that alteration in the words of the will to Lord Hardwicke; what was said by his lordship seems to be perfectly correct. With respect to the other part of Lord Hardwicke's judgment, we consider it an authority on which we ought to act. The disposition of courts should always be to abide by the words of a will, and to read them in their ordinary grammatical *sense. If we do so in this case, and make no alteration whatever, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under twenty-five; but we are sure of carrying into effect a manifest and declared intention of the testator, to give the remainder over to Joseph on the determination of the estate tail; on the other hand, if we change 'or' into 'and,' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat the clear and manifest intention to give the remainder to Joseph on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided. We think, therefore, that we are more likely to carry into effect the intention of the testator, by not departing from the words of the will, and that sound rule of construction. If the first limitation had been to John and his heirs, if he should die under twenty-five or without issue, then to Joseph, we should have felt ourselves bound by the numerous authorities on that subject to hold the dis-

junctive 'or' must be construed as the conjunctive 'and.' But as none of the authorities apply to an estate tail, and we have Lord *Hardwicke's* high authority for distinguishing such a case, we are of opinion we ought to do so, and abide by the ordinary sense of the words. If, in this case, any change in the language should be made, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been, 'and if it should please God to take away both John and Ann under age, *or at any time*,' without issue. By so reading them, the issue would take if their parents died under twenty-five, and Joseph succeed on the determination of the estate tail. But if this cannot be done, we think we should make no change at all; and by so doing are much more likely to construe the will according to the testator's intent than by altering 'or' into 'and.'"

* 10. If we change the form of expression in this class of cases, slightly, we often reverse the force of the conjunctive or disjunctive particles, by placing the different members of the sentence in different relations to the verb, upon which the devise depends. Thus, upon a devise to A, and if he die without arriving at twenty-one, or having issue, then over, renders it clear, that both events must concur to pass the estate over. But if we say instead, if he die before twenty-one, or without issue, then over, the meaning is reversed, and the estate passes upon the occurrence of either event. Then, again, other forms of expression are wholly equivocal, as if he die without arriving at the age of twenty-one, or having issue, we may understand that both events must concur, and that "having issue" will defeat the estate, or we might say, that "having issue" was one of the conditions upon which the estate was made to pass over. These illustrations might be carried much further. But we have said enough to show, that the construction must be according to the circumstances and context.

11. But the latest authoritative determination of the House of Lords,[24] upon this vexed question, certainly manifests a very * de-

[24] Grey *v.* Pearson, 6 House Lds. Cas. N. S. 61. The cases are here reviewed by the Lord Chancellor, and by two of the other Law Lords, upon different views of the case, and the whole subject most exhaustively discussed. Lord *Wensleydale*, whose opinion coincided with the decision of the case, thus declared the rules for the construction of wills, and no man's opinion is entitled to more respect: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in con-

cided intimation of a desire to return, as far as consistent with the clearly-settled rules of construction, to the obvious and natural import of the words found in the will. That case was this: The testator was possessed of two estates, and devised them, subject to debts and legacies, in trust for his grandson, and the heirs of his body, "but in case he shall die under twenty-one years, *and* without issue, then over, in trust, for his grand-daughter, upon the same limitation. The grandchildren both attained the age of twenty-one, and died without issue. And it was held, Lord *St. Leonards* dissenting, that the words must be read in their ordinary sense, as written. The first limitation over depended on the double event of the grandson dying * under twenty-one, *and* without issue, which, not having hap-

struing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance, or inconsistency, with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." "The expression, that the rule of construction is to be the *intention* of the testator, is apt to lead into error, because that word is capable of being understood in two senses, namely, as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing. To ascertain which, every part of it must be considered with the help of those surrounding circumstances, which are admissible in evidence to explain the words, and put the court as nearly as possible in the situation of the writer of the instrument." His Lordship then gives what he esteems the ordinary and natural sense of the words of the will, and adds: "If the words were quite clear, we could not alter them, in order to carry into effect what might reasonably be conjectured, (but it would have been conjecture only,) to have been the design of the testator."

"But the principle of construction which I have laid down, is in my mind of such paramount consequence, that I think it of much more importance to adhere to it, than to follow the authority of the previous decisions of the courts, upon other words in other wills resembling those used in the present. We are bound by decided cases, for the sake of securing as much certainty in the administration of the law, as the subject is capable of." "It seldom happens that the words of one will are a sure guide for the construction of words resembling them, in another. Besides, the salutary rule of construction, I have mentioned, may have been misapplied in the particular cases, and then they really become of no binding authority at all."

"When, indeed, by a course of decisions, words have acquired a particular signification, it may be presumed, that the framer of the instrument uses them in the sense so acquired, and it is fitting so to construe them. But when there has been an instance or two only of the words being read in a different sense from that which they naturally bear, we cannot make any such presumption."

pened, the limitation over did not take effect, but the estates descended to the heir at law.

12. This case seems to have been decided upon the ground, that the technical rule which has been followed in so many of the cases, that where the limitation of an estate is to one and his heirs, with a limitation over, if he dies under twenty-one *or* without issue, the word "or" shall be read "and," is too firmly established, to be now drawn in question. But that it is not based upon the most satisfactory grounds, and should not be extended beyond the precise limits to which its terms carry it. And that it will not control, where the testator gives an estate tail to a person and the heirs of his body, with a limitation over, if he die under twenty-one, *and* without issue, but the latter case, both upon principle and authority, must be construed according to the natural and ordinary import of the words.

13. Where the testator devised his estates to his son, if he should attain the age of twenty-three years, or should be married with the consent of his trustees, which should first happen, and to his heirs and assigns, absolutely, forever; and in case his son should die, without attaining such age, *or*, being married with such consent as aforesaid, should die without lawful issue, or such issue should die, without attaining the age of twenty-one years, then over. The son married under the age of twenty-three, with the consent of his trustees, and afterwards attained that age. It was held, that the son was seized of an absolute estate in fee, or, at the least, of an estate tail.[25]

14. Mr. Jarman says, in regard to the series of decisions where "or" has been construed *and:* "The ground of all these decisions lay in the terms of the preceding gifts, and the * inconsistency which a literal construction would have caused between those gifts and the executory gifts over. Where there is no prior gift, therefore, the ground fails; and accordingly, a gift to A. after the death of testator's mother, *or* second marriage, death, or forfeiture of his wife, although the testator had made life provisions for both his mother and wife, upon whose death, therefore, a certain amount of the estate would be set free, yet was held to take effect immedi-

* [25] Grimshawe *v.* Pickup, 9 Sim. 591. Sir *Lancelot Shadwell*, V. C., here said: "Now I cannot but think, that the court would rather struggle to make the word *or* be read there as *and*." See also, Grant *v.* Dyer, 2 Dow, 87; Bentley *v.* Meech, 25 Beav. 197; Hawkins *v.* Hawkins, 7 Sim. 173.

ately upon the death of the mother,"[26] without the occurrence of the other alternative, and the court refused to read "or" as *and*.[27]

15. In an early case,[28] the court read "or" *and*, in favor of marriage, regarding conditions in restraint of it odious. The devise was upon condition precedent, that if the testator's son marries without competent fortune, or "without consent of trustees, the issue should not inherit," and it was held, that the consent of trustees was only required, where the son married without fortune. The words of Lord *Mansfield* here are striking and characteristic: "There can be *but one* true, legal construction of these conditions, and therefore it must be the *same* in the Court of Chancery, and *all the other* courts of *Westminster Hall*. The meaning of the testator, or the control which the law puts upon his meaning, cannot vary, in what court soever the question chances to be determined." "This testator considered money as the only qualification of a wife, but he still means to leave it to the *judgment of the trustees*, whether there might not be *some equivalent* for 'money;' he only meant to require *their sanction*, in case his son married a woman *without* a competent fortune. This is undoubtedly a condition precedent: it must have been performed before the son could take; before his interest could vest. The construction must be to vest the estate 'in case his * son married a woman with a competent fortune, or had the consent and approbation of his trustees to marry one without one.' The blunder is in the *penning* only. The meaning is — that in *either* event it shall *vest*."[29]

[26] 1 Jarman, 479 (1861).

[27] Hawksworth *v.* Hawksworth, 27 Beav. 1. And the same rule obtains in regard to changing "and" into "or." Malden *v.* Maine, 2 Jur. N. S. 206.

[28] Long *v.* Dennis, 4 Burr. 2052.

[29] It must be confessed, that his lordship deals rather summarily here, with the words of this will, and proceeds to *convert* the will to reason and justice, rather than to abide, very nicely, by the words, or the intent, of the testator, judging from his language, and the court had no other reliable guide. There is a kind of freshness and relish, about this arbitrary *rush* after justice, which is very well, in the hands of such a man as Lord *Mansfield;* but which would be very dangerous in the hands of either a weak or a corrupt judge. This will, unquestionably, *vested* the estate in the son, without any condition, either precedent or subsequent, but provided, that after his decease, it should not go to his heirs, unless the woman he married possessed a fortune, *and* the alliance was with the *consent* of the trustees. And what right courts have to defeat the intent of the testator, fairly expressed, on any ground of its unreasonableness, is more than we

16. There is a class of cases where in devises and bequests to children, or the children of such children, "or" has been construed "and," thus letting in children and grandchildren to an equal participation, even while the parents of such grandchildren were living. But there can be little question that, in fact, as has been often suggested, and as the later cases incline to hold, the alternative contemplated in such cases is, that the children only of such parents as are deceased, are properly admissible, to participate in the gift.[30]

*17. There is a class of cases, somewhat numerous, where the word "or" is interposed between the name of the first legatee, or devisee, and the heirs of such person, as to A. or his heirs forever, or in tail, in regard to which there has been considerable discussion, and where there does not seem to be a perfect coincidence. Some of the earlier cases, where this occurs, incline to treat the variation from the usual form of creating such limitations, as merely accidental, and not as being intended to create any different

can comprehend. His lordship's sarcasms have more point, as it seems to us, than they have of either reason or justice. And the same is true of the great majority of the cases, where the courts have presumed to depart from the natural import of the words of the will, in search of some conceivable construction, more natural or reasonable, when there was no invincible necessity, compelling such departure. See Monkhouse *v.* Monkhouse, 3 Sim. 119; Hawkes *v.* Baldwin, 9 Sim. 355.

[30] Richardson *v.* Spraag, 1 P. Wms. 434. In a note to this case, which is the leading case upon this point, it is said: "It seems as if it might have been agreeable to the sense of the testatrix to have understood the devise thus: 'To my daughters, and to the children of such of them as shall be dead,' &c. This is unquestionably the true construction of such a devise, and then the children being named to take the share of their parents, take in substitution for them, and thus take per stirpes, and not per capita. There can be no question, that, in ninety-nine cases out of one hundred, such construction meets the intent of the testator, while a different construction is putting a meaning upon his words which never occurred to his mind, and if it had, would have induced him to give an explanation to his will by way of codicil, or otherwise, which would have precluded the forced construction which the courts have given to this class of bequests. But where such a construction is once adopted, or any other, however forced and unnatural, it requires a certain degree of a weight thereby, and will often travel down through centuries, almost, before it finds its final resting-place, among the rejected things of the law. Hence in Horridge *v.* Ferguson, Jacob, 583, this same construction is again reaffirmed, by Sir *Thomas Plumer*, M. R., upon the authority of Richardson *v.* Spraag, which had itself no ground to stand upon. We shall discuss this point more in detail elsewhere. See also, Eccard *v.* Brooke, 2 Cox, 213; Maude *v.* Maude, 22 Beav. 290.

estate.[31] The cases where the word "or," * being interposed between the name of the first devisee, or legatee, and his heirs, has been held to indicate the intention of substituting the latter, in the place of the ancestor, are numerous, and being more recent, as a general thing, and more in consonance with the words used, must be regarded as defining the most reliable rule.[32]

18. But it seems to be settled, upon the most satisfactory grounds, that where a devise is made to one, his heirs *or* assigns, the word heirs will be regarded, as one of limitation, and the estate created to be an absolute fee simple, since the word assigns clearly indicates an absolute ownership.[33]

[31] Wright *v.* Wright, 1 Vesey, 409. It was here held, the heirs did not, in such case, take by way of substitution. See Read *v.* Snell, 2 Atk. 642; Harris *v.* Davis, 1 Coll. 416; Parkin *v.* Knight, 15 Sim. 83; Penny *v.* Turner, 15 Sim. 268. But the other class of cases is, where it is evident the testator, in order to prevent a lapse, by the death of the first devisee during his life, or for any other reason, chooses to substitute the heirs in the place of the first devisee. Speakman *v.* Speakman, 8 Hare, 180. The American cases seem to have required very clear evidence, that the word "or" was used for "and," to justify the substitution of one for the other; evidence amounting almost to certainty. See O'Brien *v.* Herney, 2 Edw. Ch. 242; Van Vechten *v.* Pearson, 5 Paige, 512; Ray *v.* Enslin; 2 Mass. 554; Carpenter *v.* Heard, 14 Pick. 449; Hunt *v.* Hunt, 11 Met. 88; Hawn *v.* Banks, 4 Edw. Ch. 664; Turner *v.* Whitted, 2 Hawks, 613.

[*32] Crooke *v.* De Vaudes, 9 Vesey, 197; Gittings *v.* M'Dermott, 2 My. & K. 69; Burrell *v.* Baskerfield, 11 Beav. 525; Montagu *v.* Nucella, 1 Russ. 165; Whitcher *v.* Penley, 9 Beav. 477; Penley *v.* Penley, 12 Beav. 547; Chipchase *v.* Simpson, 16 Sim. 485; Salisbury *v.* Petty, 3 Hare, 86; Doody *v.* Higgins, 9 Hare, App. 32; Amson *v.* Harris, 19 Beav. 210; Sparks *v.* Restal, 24 Beav. 218; In re Craven, 23 Beav. 333; Timins *v.* Stackhouse, 27 Beav. 434. But where a bequest or devise is made in such form to one or his heirs, as to show that the first devisee is to be alive at the time of the gift taking effect, there the word heirs, although preceded by the disjunctive "or," must be regarded as a word of limitation merely. Lachlan *v.* Reynolds, 9 Hare, 796. Mr. Jarman regards Newman *v.* Nightingale, 1 Cox, 341, as overruled by the preceding cases. But Lord *Thurlow's* views, there expressed, are certainly consistent with the language of the will, and not inconsistent, perhaps, with the professed principle of the more recent cases. See also, Girdlestone *v.* Doe, 2 Sim. 225; Corbyn *v.* French, 4 Vesey, 418; Tidwell *v.* Ariel, 3 Mad. 404; Hervey *v.* M'Laughlin, 1 Price, 264; Price *v.* Lockley, 6 Beav. 180; Salisbury *v.* Petty, 3 Hare, 86; the first and last of which cases favor the literal construction of the conjunction "or," and thus hold, that the words create gifts to the heirs, by way of substitution.

[33] In re Walton's estate, 2 Jur. N. S. 363; 1 Jarman, 483; Jones *v.* Price, 11 Sim. 557.

19. And where a gift is made to two, or more persons, with a power of appointment in some other, to determine in which the property shall ultimately vest, as where the testator made a gift to his three sisters, *or* their children, as his mother should, by * deed or will, appoint, and no appointment being made, it was held, that the sisters *and* their children must take concurrently, not on the ground that "or" was to be construed "and," but that it was referable only to the power given to the mother, of selection from among the class, and as that power had not been exercised, and the court could not assume its exercise, the whole class must take equally.[34] Lord *Cottenham*, Chancellor, here cites, with approbation, his own words in another case,[35] "that when there appeared to be a general intention, in favor of a class, and a particular intention, in favor of individuals of the class to be selected by another person, and the particular intention fails, from the selection not being made, the court will carry into effect the general intention in favor of the class." Longmore *v.* Broom,[36] is here referred to, where Sir *William Grant*, M. R., uses this language, "a bequest to A or B, at the discretion of C, is good, for he may divide it between them."

20. There are, no doubt, many instances, where, to prevent the divesting of a legacy, and carry out the manifest intent of the testator, the word "and" will be construed "or." Some of these cases have been already incidentally referred to, and some others will be here named.[37]

21. There is a class of cases, where the word "and" is used disjunctively by the repetition of the verb, in the manner we have before attempted to explain, in regard to the disjunctive "or." Thus a devise to the testator's two sons, and in case both the sons should die unmarried, and neither of them should * have any issue legally begotten, then over; it was held to imply, that if one of

* [34] Penny *v.* Turner, 2 Phillips, 493, s. c. 15 Sim. 368.

[35] Burrough *v.* Philcox, 5 My. & Cr. 92.

[36] 7 Vesey, 124. His Lordship here refers, in support of his decision, to Brown *v.* Higgs, 4 Vesey, 708; 5 Vesey, 495; 8 Vesey, 561. See also, White's Trust, 1 Johns. 656; Jones *v.* Torrin, 6 Sim. 255, which is attempted to be distinguished from the other cases, and Shand *v.* Kidd, 19 Beav. 310.

[37] *Wood*, V. C., in Day *v.* Day, Kay, 708; Maddison *v.* Chapman, 3 De G. & J. 536; Jackson *v.* Jackson, 1 Vesey, 217.

the sons died unmarried, and the other without issue, the estate over would vest.[38]

22. There is a class of cases, where gifts over are based upon the fact of the first donee dying within age, unmarried and without issue, in which the courts have adhered to the strict construction of the words, requiring that all the particulars shall concur, in order to have the devise over take effect.[39] But the recent cases seem to agree that the words, "dying unmarried," may import, never having been married, or having no wife at the time of death, and that one or the other construction may be adopted, according to circumstances, whichever may seem most conformable to the probable intention of the testator.[40] And even where these words occur in regard to the wife, in a marriage settlement, which is made in contemplation of her marriage, and where it has been said, it could not have been contemplated that she should die without ever being married, it has been shown, that such words may have a sensible operation, by understanding them as descriptive of her state at the time of her decease, or as defining a state of things which would have existed, if the wife had never been married.[41] In this case, the estate is required to go to "such person as the same would have gone unto by the statute of distributions, in case the wife * had died unmarried," which seems clearly descriptive of a state of things, to be conceived, and not one in fact existing, so that Lord Thurlow's reductio ad absurdum has very little meaning, when he supposes "it could not be in contemplation, in a marriage settlement, that the wife should die unmarried;" and that of Mr. Eden, in his note to this case, has quite as little, that it refers to her dying, without leaving a husband surviving, for that is the very contingency contemplated in the case. The use of the term here has reference only to

[38] Wilson *v.* Bayly, 3 Br. P. C. Toml. 195. See also, Hepworth *v.* Taylor, 1 Cox, 112; Maberly *v.* Strode, 3 Vesey, 450; Bell *v.* Phyn, 7 Vesey, 450; Mackenzie *v.* King, 12 Jur. 787. And see Dillon *v.* Harris, 4 Bligh, N. S. 321, and Lord *Brougham's* comments upon the cases involving this question.

[39] Doe d. *v.* Cooke, 7 East, 269. Lord *Ellenborough* here said: "The most rational construction we can give this will, is to construe it, as Lord *Hardwicke* did the devise in Framlingham *v.* Brand, 3 Atk. 390, *as one contingency*, namely, *dying an infant*, attended with *two qualifications*, namely, his dying without leaving a wife surviving him, or dying without children." The same rule was adopted in Doe d. *v.* Rawding, 2 B. & Ald. 441.

[40] 1 Jarman, 488; Maugham *v.* Vincent, 4 Jur. 452.

[41] Hoare *v.* Barnes, 3 Br. C. C. 316, and Mr. Eden's note.

a supposed state of facts, that the wife had died without ever being married, in order to determine her next of kin, thus excluding her husband surviving her, who would be regarded, as quasi next of kin,[42] for many purposes, if not thus excluded. It is not uncommon, that some slight circumstance may determine, in what sense the word "unmarried" is used, and to what time it should be referred, as where the children are provided for, in another part of the will, either out of the same, or some other fund.[43]

23. It seems to be settled, that the term "unmarried" is to be regarded as a designatio personæ, and if the person possesses the qualification, at the time fixed for the vesting of the estate, the same will not be divested by his subsequently marrying.[44] "Still unmarried," seems to imply that the person had never been married.[45]

24. And where it is provided, that a legacy shall lapse, if the legatee shall die in the lifetime of A *and* B, it has been held, that such lapse shall not take place, unless the death occurs in the joint lives of the persons named.[46]

* 25 The American cases seem, in the main, to have conformed, pretty nearly, to the foregoing rules, adopted by the English courts, in regard to construing conjunctive particles disjunctively, and the reverse. It is said in one case, that "and" is never substituted for "or" unless that is necessary to carry out the clear intention of the testator.[47] So, also, not unless the context favors it,[48] or where the plain intent of the testator will otherwise be defeated;[49] or the intent of the testator requires it.[50] It may be done, either by

[42] See Hardwick *v.* Thurston, 4 Russ. 380; Pratt *v.* Mathew, 22 Beav. 328; In re Saunder's Trusts, 3 Kay & J. 152; In re Gratton's Trusts, 3 Jur. N. S. 684.

[43] Coventry *v.* Earl of Lauderdale, 10 Jur. 793; Sir *Page Wood*, V. C., in Mitchell *v.* Colls, 1 Johns. 674; Re Norman's Trust, 3 De G., M. & G. 965.

[44] Jubber *v.* Jubber, 9 Sim. 503; Hall *v.* Robertson, 4 De G. M. & G. 781.

[45] Thistlethwayte's Trust, 31 Eng. L. & Eq. 547. In the case of Chorley *v.* Loveband, 33 Beav. 189, where a bequest was made dependent upon the legatee becoming "entitled, under the provisions of the will, to an estate or interest for his life, and it was held to mean "entitled in possession, and have the beneficial enjoyment of the estate."

[46] Day *v.* Day, Kay, 703, and Brudenel's Case, 5 Co. Rep. 9, was cited in support of the principle.

[47] Holcomb *v.* Lake, 4 Zab. 686; Van Vechten *v.* Pearson, 5 Paige, 512.

[48] Armstrong *v.* Moran, 1 Bradf. Sur. Rep. 314.

[49] Harrison *v.* Bowe, 3 Jones, Eq. 478; Robertson *v.* Johnston, 24 Ga. 102.

[50] Mason *v.* Mason, 2 Sandf. Ch. 432.

converting "and" into "or," or the converse, to effectuate the clear intent of the testator, as apparent upon the whole will, either in regard to the first devisee, or the gift over.[51] But in wills, where an estate is given over in the event of the first devisee dying under age, or without issue, the more general construction seems to be, that the estate will not take effect over, unless both events concur, thus construing "or" as if written "and."[52]

*SECTION VII.

REMEDY WHERE THERE IS REASONABLE DOUBT IN REGARD TO THE PROPER CONSTRUCTION OF INSTRUMENT CREATING A TRUST.

1. Executors and other trustees may bring bill in equity, in nature of bill of interpleader.
2. Such bill may be brought by any party claiming an interest in the trust.
3. The precise character of the remedy.
4. Rule in regard to costs.
5. The English Statute gives trustees the right to ask advice in matters of discretion.
6. The trustee may pay the money into court and have his costs.
7. When costs come out of the general assets, and when out of the particular legacy.
8. When the fund is gone from the control of the court no costs can be awarded out of it.

[51] Janney *v.* Sprigg, 7 Gill, 197.

[52] Robertson *v.* Johnston, 24 Ga. 102; Kelso *v.* Dickey, 7 Watts & Serg. 279; Shands *v.* Rogers, 7 Rich. Eq. 422. In one case, "maturity" was held equivalent to "puberty." Robertson *v.* Johnston, supra. And "reviving son" was construed "surviving son," where such was the evident import. Pond *v.* Bergh, 10 Paige, 140. See Jackson *v.* Blansham, 6 Johns. 54.

As bearing upon the general question of changing words by construction, see Keith *v.* Perry, 1 Desaus. 353, where "her" was construed "their." Bowers *v.* Porter, 4 Pick. 198; Ellis *v.* Essex Merrimac Bridge, 2 Pick. 243; Brailsford *v.* Heyward, 2 Desaus. 18, where "heirs" was read "children;" Morton *v.* Barrett, 22 Maine, 257, 264, where "heir" was held to mean "heir apparent." Merrymans *v.* Merryman, 5 Munf. 440, where "children" was held equivalent to "issue," and Osgood *v.* Lovering, 33 Maine, 464, where the word "children" was held to include "grandchildren." It is not uncommon to construe the expression "if he should die," as meaning, "when he should die." Smart *v.* Clark, 3 Russ. 365. And "return" was construed "remain." McMurtrie *v.* McMurtrie, 3 Green, 276. But no change of one word for another will ever be made, except it becomes necessary, to carry into effect the clearest intent of the testator. Holcomb *v.* Lake, 4 Zab. 686. Words are not to be changed or rejected, unless they manifestly conflict with the plain intention of the testator, or are absurd, or unintelligible. Wootton *v.* Redd, 12 Grattan, 196.

§ 36. 1. It seems to be settled, by the established practice of the courts of equity in England, and in many of the American states, that any executor or other trustee holding estate, real or personal, under any trust, created by a last will and testament, or any other instrument, where doubt arises in regard to the true construction of the instrument by which the trust was created, and there are different claimants, may bring his bill, setting forth the facts, and calling upon the claimants to settle their rights before the court, and praying the order of the court, in regard to the mode of executing the trust.[1]

2. Such bills are, in the case of wills, more commonly brought by executors, or administrators with the will annexed. But the suit may be brought by any party, claiming an interest under the will, against the executor, or administrator, and all other parties interested in the question.[2]

* 3. These bills have been called, more commonly, in a loose way, bills of interpleader. But they are not strictly such, since the plaintiff claims an interest in the matter in controversy, either as trustee, or cestui que trust, which is not the case in bills of interpleader, in the strict sense of the term. These bills may properly enough be denominated bills, in the nature of bills of interpleader.[3] To the same head may be referred a bill in equity, at the suit of the heir at law, to set aside a will devising the estate to others, on the ground of fraud.[4] But the heir at law is not entitled to maintain such bill as matter of course. If there are any circumstances implicating the heir in the suppression of the will; or if the evidence in favor of the will is very strong, such a bill will not be sustained. It is matter of discretion with the court, whether to retain the bill. But, ordinarily, where no special reason exists the bill is retained, and an issue granted, devisavit vel non, to be tried by the jury, in a court of law, or, which is the more convenient

[1] Treadwell *v.* Cordis, 5 Gray, 341; *Shaw*, Ch. J., id. 348; Dimmock *v.* Bixby, 20 Pick. 368; Hooper *v.* Hooper, 9 Cush. 127.

[2] Bowers *v.* Smith, 10 Paige, 193. But the decree will bind only such interests as are represented in the suit. Atkinson *v.* Holtby, 10 Ho. Ld's Cas. 313.

[3] 2 Story, Eq. Jur. § 824; Mohawk and Hudson Railroad Company *v.* Clute, 4 Paige, 384. See other cases cited by the learned author of Eq. Jur. § 824, above referred to.

[4] Jones *v.* Gregory, 9 L. T. N. S. 556; 9 Jur. N. S. 1171.

practice, where the statutes and rules of practice allow it, to be tried at the bar of the court directing the issue.[5]

4. And where the executor, or other person appointed to carry into effect the provisions of a will, comes into a court of equity, to obtain the direction of the court, in regard to the construction of the instrument, or the mode of carrying its provisions into effect, the expense of such litigation, as it respects all the parties, and as between the attorney and client, is charged upon the whole estate.[6] This rule will of necessity operate severely upon the * residuary legatees, since it does, in effect, charge the whole expense of the litigation upon them. But there seems to be no mode of evading such a result, since the interest of such legatees is only in the residuum after all charges and expenses upon the estate are paid. And a charge of this character is just as much a burden upon the whole estate as any other necessary expense attending the settle-

[5] Williams *v.* Williams, 9 L. T. N. S. 565; 9 Jur. N. S. 1267; Cowgill *v.* Rhodes, 12 W. R. 190 (1863).

[6] Studholme *v.* Hodgson, 3 P. Wms. 303; Pearson *v.* Pearson, 1 Sch. & Lef. 12; Barrington *v.* Tristram, 6 Vesey, 345; Jolliffe *v.* East, 3 B. C. C. 25; Baugh *v.* Reed, id. 192; *Morton*, J., in Sawyer *v.* Baldwin, 20 Pick. 388, 389. The * English practice is to pay the fund into court, and there the parties appear and obtain the judgment of the court, as to their rights. Hooper's Will in re, 7 Jur. N. S. 595 (1861). Where the application is a proper one, Sir *John Romily*, M. R., said, in Attorney-General *v.* Jesus College, Oxford, 7 Jur. N. S. 592: "The costs of all parties must come out of the estate generally." And if it be a condition of such an order, that the application be a proper one, it should equally be required, perhaps, that it he not improperly resisted. Vice Chancellor *Stuart* made a similar order, in Wheeler *v.* Thomas, 7 Jur. N. S. 599. That seems to be the established practice in the English courts of equity, in all that class of cases which are there denominated bills "to obtain a declaration of the rights of the parties interested under the will, and for the administration of the estate, by the court." Id. And the same rule was early established in the state of New York, where equity decisions take precedence of those of any other American state, perhaps. Rogers *v.* Ross, 4 Johns. Ch. 608; Morell *v.* Dickey, 1 id. 153. *Kent*, Chancellor, in the first of these cases, said: "It has been frequently [decided in this class of cases] that costs ought to be charged upon the general assets of a testator, or upon a general fund created by his will, if the will be so drawn as to create difficulty, and render a resort to this court advisable." It is common in the new Court of Probate in England for the judge to order the costs of all parties in a controversy about the validity of a will, even where the instrument is disallowed, to be paid out of the whole estate. Grimwood *v.* Cozens, 5 Jur. N. S. 497. Where the ambiguity of the will renders the suit necessary, the costs will be apportioned among the several interests, such as the residuary personal estate, and the real estate, according to equity. Puxley *v.* Puxley, 8 L. T. N. S. 570, V. C. *Wood*.

ment of the estate.[7] Where the controversy is in regard to the amount of a specific legacy, there is an equity that such legacy should bear its proportion of the expense. But there seems no mode of effecting it, except through the special discretion of the court, in making the * specific allowances in the particular case. The general rule undoubtedly is, that whenever the testator raises a doubt in regard to the meaning of his will, his general property must pay for settling it.[8]

5. By a late English statute,[9] executors and other trustees are empowered to petition the courts of equity for direction, how to proceed in all matters of discretion reposed in them; and the decision of the court upon such matter upon the facts presented is conclusive. But upon such applications the court will not determine questions of construction coming appropriately within the class of bills already considered.[10]

6. The trustee, whenever any dispute arises in regard to the title to funds in his hands, may pay the money into the Court of Chancery, upon his own petition, and be discharged from his trust, with costs, and leave the court to administer the fund according to equitable principles, through the instrumentality of its own appointees.[11]

7. The distinction as to paying the costs of a legatee out of the general fund of the estate, or out of the particular legacy, in the English practice seems to turn upon the point, whether the whole fund is brought into the court to be administered, or only the amount of the particular legacy. In the former case, as well as

[7] Andrews' Ex'rs *v.* Bishop and others, 5 Allen, 490. Wood *v.* Vandenbergh, 6 Paige, 277. But in England, since the statute 36 Geo. III. c. 52, § 32, allowing the legacy of an infant to be paid into the bank of England, it has been intimated, that, if the executor retain the money, and a suit is brought, he will not be allowed his costs out of the general assets. Lord *Alvanley*, M. R. in Whopham *v.* Wingfield, 4 Vesey, 630. But this is only applicable to cases where the executor might have paid the money, and saved all question, leaving the legatee to call for it when entitled. Before this suit, the executor must retain the money, and it was fair his costs should be paid as part of the costs of administration.

[*8] Lord *Eldon*, Chancellor, in Barrington *v.* Tristram, 6 Vesey, 345, 349.

[9] 22 & 23 Vic. c. 35, § 30.

[10] Hooper in re, 7 Jur. N. S. 595.

[11] Swan in re, 2 H. & M. 34; 10 Law T. N. S. 334, by Vice Chancellor *Wood*; Re Barber, 9 Jur. N. S. 1098. See also Re Bloye's Trust, 1 McN. & G. 488; Re Woodburn's Wills, 1 De G. & J. 333.

the latter, the costs are paid out of the fund. But in the one case the fund embraces the entire residue of the estate after paying those claims in regard to which there is no controversy as to their priority of payment;[12] and in the other the particular legacy is separated from the residue, and brought into court to be there administered by itself, in which case the costs will come out of that particular fund.[13]

8. Where the fund is no longer in the possession of the parties, or under the control of the court, having been paid over to the party rightfully entitled to hold it, costs cannot be awarded to come out of it. The bill was accordingly dismissed without costs to either party as against the other.[14]

[12] Thomas *v.* Jones, 1 Drew. & Sm. 134.

[13] Martineau *v.* Rogers, 8 De G. M. & G. 328.

[14] Annins Exrs. *v.* Vaudoren's, Adm. 1 McCarter, 135.

CHAPTER X.

EXTRINSIC EVIDENCE IN AID OF CONSTRUCTION.

SECTION I.

GENERAL PRINCIPLES AFFECTING ITS ADMISSIBILITY.

1. The rule in regard to wills the same as in contracts.
2. Admissible in order to place the court in the position of the testator.
3. But not to render any extrinsic fact part of the will.
4. The rule in this respect the same, in equity, as at law.
n. 6. The early exceptional cases are not of much authority.
5. Such evidence cannot supply any defect, or accidental omission.
6. But may show that part of the instrument is not the testator's will.
7. This will not render the whole void.
8. Courts of equity correct mistakes apparent on face of will.
n. 12. Recent English cases restrict this rule to such mistakes as are self-evident.
9. This correction of mistakes in wills is effected by construction merely.
10. Parol evidence admissible to remove latent ambiguities and to rebut a resulting trust.
11. An unintelligible will cannot be made good by extrinsic evidence.
12. The difficulty exists in clearly defining the exceptions to the rule.
13. How far extraneous circumstances admissible in Delaware.
14. The rule as declared by the New York courts, and other states.
15. Where the will is unnatural or improbable, proof of testator's motive allowed.

§ 37. 1. THE rules of the admission and exclusion of parol evidence in regard to wills, are essentially the same which prevail in regard to contracts generally.

2. It cannot be received to show the intention of the testator, except by enabling the court, where the question arises, to give * his language such an interpretation, as it is reasonable to presume, from the circumstances in which he was placed, he intended it should receive; or to put the court in the place of the testator.[1]

*[1] Hence the testimony of the scrivener is not admissible to show what directions were given him by the testator, in regard to drawing the will. Brown *v.* Selwyn, Cas. Temp. Talbot, 240; s. c. House Lds. 3 Br. P. Cas. 607. The cases, bearing upon this general question, are quite too numerous to be here repeated.

3. This will be best illustrated, by referring to some of the leading decisions upon the question. It was held, in an early case,[2] that parol evidence could not be received to show that the words, "all other my lands, tenements, and hereditaments out of settlement," was intended to include a reversion. The same rule is declared in 33 Eliz. in the Wards' Court.[3] "In a devise of land, by writing, an averment out of the will shall not be received. For a will, concerning land, ought to be in writing, and not by any averment out of the same; otherwise it were great inconvenience, that not any may know, by the written words of the will, what construction to make, if it might be controlled by collateral averment, out of the will." This contains, in brief, the substance of the rule, and the reason for it. The same rule is almost universally recognized in the English courts, from the earliest times forward.[4]

4. Some of the earlier cases attempted to make a distinction, in this respect, between courts of law and those of equity. Hence we find it declared, very early,[5] that a general devise by a husband to his wife, cannot, at law, be averred to have been * intended, in lieu of dower, though it may, in equity.[6] And where it was attempted, in chancery, to show by papers, letters, and sayings of the testator, that he had a certain intent, in making his will, the court held, that these collateral papers, &c., could not be taken notice of, to influence the construction of the will, since that would be to let them in, as part of the will itself.[7]

5. It seems perfectly agreed, that parol evidence is not admissible, to supply any omission or defect in a will, which may have occurred through mistake or inadvertence.[8] The case last cited, was a bill

[2] Strode *v.* Lady Falkland, 3 Ch. Rep. 98; 1 Jarm. 1861, 379.

[3] The Lord Cheney's Case, 5 Co. 68 *b*. This case, and most of the early case, are limited to wills of real estate, the law not requiring wills of personalty to be in writing until 1838. The same rule now applies to all estate, both real and personal, in England, and in most of the American states.

[4] Vernon's Case, 4 Coke, 1, 4.

[5] Lawrence *v.* Dodwell, 1 Ld. Ray, 438.

[6] Lawrence *v.* Lawrence, 2 Vernon, 365. But this decree (which seems to have gone upon the ground, that in order to bar the devisee, at law, by a devise, it must be expressed, in terms, to be in lieu of dower, but that, in equity, such purpose of the testator might be presumed, or inferred) was reversed in the House of Lords, upon appeal. 2 Vernon, 366; 1 Lord Ray, 438 in n.

[7] Bertie *v.* Falkland, 1 Salk. 231; s. p. Towers *v.* Moore, 2 Vernon, 98; opinion of court, in Bennett *v.* Davis, 2 P. Wms. 316, 318.

[8] Newburgh *v.* Newburgh, 5 Mad. 364. It is here held, that parol evidence is

brought to reform a will, where part of a devise had been omitted by mistake. The court held, that they had no power to make any such decree, as that would be, in effect, to dispense with the provisions of the statute of frauds, * in all cases, where the testator, through inadvertence or mistake, either of himself, or others, to whom he intrusted the drawing up of his will, had failed to express his real intentions, or to do it intelligibly.

6. A distinction has been attempted by some writers, between parol evidence being received to explain, vary, or contradict the will, as expressed, and that which is adduced to show, that the instrument, or a portion of it, is not the will of the testator. The language of Mr. Jarman, a most accurate writer, will best express the point: "The distinction is a very important one. It seems to amount to this; that though you cannot resort to parol evidence, to control the effect of words or expressions, which the testator has used, by showing that he used them under a mistake or misapprehension, nor to supply words that he has not used, yet that you may, upon an issue devisavit vel non, prove that clauses, or expressions, have been inadvertently introduced into the will, contrary to the testator's intentions and instructions, or, in other words, that a part of the executed instrument is not his will." [9]

7. The question has been made, how far parol evidence may be

admissible to show, that the will was not that of the testator, as to a particular estate, which was intended to have been given, by the will, and was omitted through the mistake of the scrivener. In the case of Langston *v.* Langston, 8 Bligh, N. S. 167, a mistake in the will in question occurred by the omission of a line in copying, and although Lord *Brougham* called for, and inspected the draught, in opposition to the urgent protest of counsel, he nevertheless declared, that such evidence was altogether inadmissible, at the same time that his lordship was taking the benefit of its aid, in fixing a construction upon the instrument, as actually drawn up and executed. But a mistake in a will, whereby it fails to be what it was intended it should be, does not render the instrument inoperative, in those particulars, where it is intelligibly expressed. Comstock *v.* Hadlyme, 8 Conn. 254. See, upon the general question, Cæsar *v.* Chew, 7 Gill & J. 127; Andress *v.* Weller, 2 Gr. Ch. 604; Hyatt *v.* Pugsley, 23 Barb. 285; Abercrombie *v.* Abercrombie, 27 Ala. 489; Harrison *v.* Morton, 2 Swan, 461; 1 Jarman, Perk. ed. 1860, 353 and notes.

[*9] Hippesley *v.* Homer, Turn. & Russ. 48, n. This case, taken in connection with Newburgh *v.* Newburgh, 5 Mad. 364, seems to establish the proposition, that although a court of equity cannot set up any thing, as the will of a testator, which he did not execute, according to the requirements of the statute, however clear may be the evidence of his intention; it may, nevertheless, declare a paper, which is duly executed, and proved at law, as a will, to be no will, but to have been obtained by fraud or mistake, either in whole or in part. See ante, § 30 c, pl. 23.

received, to show that essential portions of a will, duly executed and proved, so far as the formal attestation is concerned, were not according to the intention of the testator, and that he exeeuted the instrument under the apprehension that it was differently expressed from what it was in fact, and that otherwise he would not have executed the same at all; and that those provisions, which the instrument did contain, were *made in dependence upon others, and relatively to them, and but for the expectation of the will containing such correlative provisions, those which were inserted would not have been allowed to stand.[10] This subject is a good deal discussed in a carefully considered case,[11] by Mr. Justice *Cowen*, and the following view adopted: "The rule . . . that the failure of part is fatal to the entire instrument; that the intent of the testator, the soul of the will, is indivisible; that the whole must be effectual, or its identity is lost, and it can no longer be known or traced by the law; would operate as a sentence of nullity against the more important class of wills." We apprehend, that unless the result was brought about by fraud and deception, it would be difficult to define any clear basis upon which courts of equity could interfere to set aside a will, because some of its provisions could not be carried into effect, according to the intent of the testator, or because others, by accident or mistake, were wholly omitted.[11] It would be more reasonable, perhaps, to allow courts of equity to reform wills, and correct mistakes in them, which has not been generally regarded as allowable.[11]

8. There seems to be no question, as already intimated, that courts of equity hold themselves competent to correct any mistake which is apparent upon the face of a will, or which can be made out, by fair and reasonable construction, from the other parts of the will, in connection with, and as expounded by, other circumstances.[12] But the fact of a mistake being made, and its *precise

*[10] Comstock *v.* Hadlyme, 8 Conn. 254. This point is considerably discussed, by Chief Justice *Williams*, in this case, and the conclusion adopted, that a will cannot be avoided upon any such ground. It is admitted the case of Downhall *v.* Catesby, Moore, 356, which was decided while the statute of Henry VIII. was in force, adopts this view of the law.

[11] Salmon *v.* Stuyvesant, 16 Wend. 321; Chappel *v.* Avery, 6 Conn. 34; 1 Story, Eq. Jur. § 180 a (1861).

[12] Mellish *v.* Mellish, 4 Vesey, 45; Phillips *v.* Chamberlaine, 4 Vesey, 51. This rule has been extended to an evident mistake in the computation of a legacy. Milner *v.* Milner, 1 Vesey, 106. So, also, where the testator devised *£700 *East*

character and extent, must clearly appear upon the face of the will itself, or from fair and obvious legal construction, aided by such facts and circumstances, as are admissible for that purpose.[13]

9. We are not aware that any essential difference exists in regard to the construction of wills, between courts of law and courts of equity. Mistakes, apparent on the face of wills, in all courts, will be corrected, or the instruments treated and enforced precisely as if expressed, as it is obvious they were intended to have been. This is the rule in courts of probate, in the settlement and distribution of estates, and in courts of law, where titles to property, real or personal, are attempted to be derived under a will. This question is very extensively discussed by Chancellor *Kent*,[14] and the earlier cases carefully revised. That experienced and careful judge, thus expresses the rule of law: "It is a well-settled rule, that seems not to stand in need of much proof or illustration, for it runs through all the books, from Cheney's case (5 Co. Rep. 68) down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases; 1, where there is a latent * ambiguity, arising dehors the will, as to the person or subject-matter meant to be described; and 2, to rebut a resulting trust. All the cases profess to go upon one or the other of these grounds."

11. "Perhaps a solitary dictum may occasionally be met with (for there are volumes of cases upon wills, immensus aliarum super alias cumulus), in favor of the admission of parol proof, to explain an ambiguity or uncertainty, appearing on the face of a will, though Lord *Thurlow* says, there is no such case. If there be, we may

India stock, having none, but there being £700 of *bank-stock*, it was held, that passed under the will. Door *v.* Geary, 1 Vesey, 255. It is obvious, we think, that the late English cases would scarcely warrant such a departure from the words of the will, unless circumstances very clearly show such must have been the intent. The cases where equity assumes to correct an apparent mistake in a will, are, where the specific terms used are overruled and controlled by some general purpose clearly defined, as the residue of "my stock, supposed to be £500," and it turns out to be £800. Courts of equity will allow the legatee to take the whole sum. Danvers *v.* Manning, 2 Br. C. C. 18. See also, Giles *v.* Giles, 1 Keen. 692.

[13] 1 Story, Eq. Jur. § 181, and cases cited.

[14] Mann *v.* Mann, 1 Johns. Ch. 231. The mere fact that legacies, directed to be inserted in a will, are omitted, does not invalidate the will, in the absence of incapacity, undue influence, or fraud, if, at the time of execution, the contents of the will are known to the testator. Mitchell *v.* Gard, 32 L. J. Prob. 129.

venture to say, it is no authority. If a will be uncertain or unintelligible on its face, it is as if no will had been made, quod voluit non dixit."

12. It is well said, there is no end of citing cases upon this general question. The difficulty here is the same as it is upon all legal questions, and, indeed, upon all questions, to define the extent of the rule, by carefully fixing the limits of the exceptions. We must pass to that portion of the subject, referring the student to the notes, for a digest of the leading cases upon the main question.[15]

[15] Sir James Wigram, in his most reliable work upon the rules of law respecting the admission of Extrinsic Evidence in aid of the Interpretation of Wills, has divided the subject into seven Propositions, as follows:

"Proposition I. A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

"Proposition II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

"Proposition III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.

"Proposition IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words.

"Proposition V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he

*13. The decisions, in the American courts, have, in the main, professed to pursue the same general rules, in regard to the

has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

"Proposition VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases, see Prop. VII.*) will be void for uncertainty.

"Proposition VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning — courts of law, in certain special cases, admit extrinsic evidence *of intention*, to make certain the *person or thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator."

These several propositions the learned author has most elaborately illustrated and fortified by an extensive examination of the cases. His enumeration of the instances, where it has been held that such evidence is not admissible, is, perhaps, worthy of insertion here as the most thorough anywhere to be found, so far as the English cases are concerned. The learned author, pl. 121, p. 88, says: "Thus it has been laid down (either in dictum or decision), that evidence is inadmissible for the purpose, — 1, of filling up a total blank in a will, Baylis *v.* Attorney-General, 2 Atk. 239; Castledon *v.* Turner, 3 Atk. 257; Hunt *v.* Hort, 3 Bro. C. C. 311, [Taylor *v.* Richardson, 2 Drew. 16]; or 2, of inserting a devise omitted by mistake, Lady Newburgh's case, 5 Madd. 364; Anon. 8 Vin. Abr. 188, G. a, pl. 1; or 3, of proving what was intended by an unintelligible word, Goblet *v.* Beechey, App. infra, No. 1, and 3 Sim. 24; or 4, of proving that a thing *in substance*, different from that described in the will, was intended, per M. R. in Selwood *v.* Mildmay, 3 Ves. Jr. 306; or 5, of changing the person described; Delmare *v.* Robello, 1 Ves. Jr. 412; and see per M. R. in Beaumont *v.* Fell, 2 P. Wms. 140; or 6, of reconciling conflicting clauses in a will, per Lord *Hardwicke*, C., in Ulrich *v.* Litchfield, 2 Atk. 372; or 7, of proving to which of two antecedents a given relative was intended to refer, Lord Walpole *v.* Cholmondeley, 7 Term R. 138; Castledon *v.* Turner, 3 Atk. 256; or 8, of explaining or altering the estate; Cheyney's case, 5 Rep. 68; or 9, of proving which of several testamentary guardians was intended to have the actual care of children, Storke *v.* Storke, 3 P. Wms. 51; 2 Eq. Abr. 418, pl. 13; contra, Anon. 2 Ves. Sen. 56. The admissibility of evidence in this case may be satisfactorily explained; for, if guardians disagree, the court has jurisdiction independently of the will, and then the evidence may be resorted to as a guide for the independent judgment of the court; or 10, of proving what was to be done with the interest of a legacy till the

* admissibility of parol evidence, which we have already indicated, but particular decisions, do not always appear altogether

time of payment, Mansel *v.* Price, Sugd. Vend. 138, 6th ed.; or 11, of proving that, by a bequest of residue, a particular sum was intended, Brown *v.* Langley, 2 Eq. Abr. 416, pl. 14, and 8 Vin. Abr. 197, pl. 36. See Dyose *v.* Dyose, 1 P. Wms. 306, disapproved by Lord *Thurlow*, in Fonnereau *v.* Poyntz, 1 Bro. C. C. 472, and by Sir *W. Grant*, M. R., in Page *v.* Leapingwell, 18 Ves. 466; and see 1 P. Wms. 306, n.; or 12, of construing the will with reference to the instructions given for preparing it, Goodinge *v.* Goodinge, 1 Ves. Sen. 230; Murray *v.* Jones, 2 Ves. & B. 318, [Bernasconi *v.* Atkinson, 10 Hare, 348]; or 13, of proving, that an executor was intended to be a trustee of residue for next of kin, Bishop of Cloyne *v.* Young, 2 Ves. Sen. 65; White *v.* Williams, Coop. 58; Langham *v.* Sanford, 2 Mer. 17; or 14, of proving that an executor was intended to take beneficially, where, upon the face of the will, it was conclusively apparent, that he was intended * to be a trustee, s. c.; or 15, of controlling a technical rule of verbal construction, per Lord *Kenyon*, C. J., and *Lawrence*, J., 6 T. R. 252, 354; or 16, of explaining the sense in which the word 'relations' was intended to be used, Goodinge *v.* Goodinge, 1 Ves. Sen. 230; Edge *v.* Salisbury, Amb. 70; Green *v.* Howard, 1 Bro. C. C. 31; or 17, what a testator intended to give by the word 'plate,' Nicholls *v.* Osborn, 2 P. Wms. 419; Kelly *v.* Powlet, Amb. 605; or 18, what a testator intended to devise by the words 'lands out of settlement,' Strode *v.* Russell, 2 Vern. 621; or 19, of proving that a portion was intended to be a satisfaction of a bequest of residue, Freemantle *v.* Bankes, 5 Vesey, 85; or 20, that a legacy in a codicil was intended to be a substitution for a legacy in the will, Hurst *v.* Beach, 5 Madd. 351; or 21, of proving that a devise to a wife was intended to be in bar of dower, Leake *v.* Randall, 1 Vin. Abr. 188, G. a, pl. 3; or 22, of supplying a use or trust, Id. pl. 4; or 23, of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoneration of the personal estate, Booth *v.* Blundell, 1 Mer. 193; or 24, of proving that the intention, in appointing a debtor to be executor, was to release the debt, Brown *v.* Selwin, Cas. temp. Talbot, 240; s. c. on appeal, 3 Bro. P. C. 607; or 25, of rebutting a presumption which arises from the construction of words simply quà word, per Lord *Thurlow*, 2 Bro. C. C. 527; or 26, of raising a presumption, Rachfield *v.* Careless, 2 P. Wms. 157; or 27, of increasing a legacy, per Lord *Hardwiche*, in Goodinge *v.* Goodinge, 1 Ves. Sen. 231; or 28, of increasing that which is defective, Anon. 8 Vin. Abr. 188, G. a, pl. 1; or 29, of adding a legacy to a will, Whitton *v.* Russell, 1 Atk. 448; or 30, of proving what interest a legatee was intended to take in a legacy, Lowfield *v.* Stoneham, 2 Strange, 1261; or 31, of ascertaining an intention which, upon the face of the will, was indeterminate, as in the case of a devise to one of the sons of A, who hath several sons, 2 Vern. 265; and see Altham's case, 8 Rep. 155; or 32, of proving that words of limitation were intended to be construed as words of purchase, Bret *v.* Rigden, Plow. 340; and see Doe *v.* Kett, 4 T. R. 601; Maybank *v.* Brooks, 1 Bro. C. C. 84; or 33, of proving that executors, who had acted in part, and then renounced, were intended by the testator to act only to the extent to which they had acted, Doyle *v.* Blake, 2 Sch. & Lefr. 240; or 34, of proving that the testator meant to

* reconcilable with those rules. In Delaware,[16] it has been declared, that evidence may be received in aid of the construction, * and as tending, either to invalidate or corroborate the will; of the age of the testator, his state of health, circumstances and condition; his known preferences and affections, and of the correspondence, or contradiction, of the will therewith; the manner of making, or altering the will; the persons around him, at the time, their capacity and credibility.

14. In New York, the courts have steadily adhered to the rule, before stated, that parol evidence is inadmissible to supply or contradict, enlarge or vary, the words of a will, except in two cases: 1. Where there is a latent ambiguity; 2. To rebut a resulting trust.[17] An ambiguity, apparent upon the face of the will, cannot be explained by parol evidence, or the natural force of the words varied, as that, by a bequest of all his money the testator meant to include bonds, mortgages, and promissory notes.[18] It has been decided there, that the state of the testator's * property cannot be shown, unless for the purpose of removing a latent ambiguity, but this proposition is scarcely maintainable.[19] Nor can the relative

use general words in this or that particular sense, Goodinge *v*, Goodinge, 1 Ves. Sen. * 231; or 35, of adding to, or detracting from, or altering, the will, Herbert *v.* Reid, 16 Vesey, 481; or 36 (generally), of proving *intention*, per *Buller*, J., in Nourse *v.* Finch, 1 Ves. Jr. 358; per Sir *Wm. Grant*, M. R., in Cambridge *v.* Rous, 8 Vesey, 22, and in Bengough *v.* Walker, 15 Vesey, 514; per Lord *Eldon* in Herbert *v.* Reid, 16 Vesey, 485, 486, 489; Attorney-General *v.* Grote, 3 Mer. 316; Maybank *v.* Brooks, 1 Bro. C. C. 84 (legatee dead); Doe *v.* Kett, 4 T. R. 601 (devisee dead); Lord Lansdowne's case, 10 Mod. 98, 99; Cole *v.* Rawlinson, 1 Salk. 234; Bertie *v.* Lord Falkland, 1 Salk. 231 (instructions for the will); Lowfield *v.* Stoneham, 2 Strange, 1261; Chamberlayne *v.* Chamberlayne, 2 Freem. 52; Towers *v.* Moor, 2 Vern. 98; Vernon's case, 4 Rep. 4; Cheney's case, 5 Rep. 48; Butt *v.* Rigden, Plow. 340; Bac. Elem. Reg. 23; 2 Bac. Abr. 309; Challoner *v.* Bowyer, 2 Leon, 70; and the following treatises, — Sugd. Vend. tit. 'Ambignity;' Phil. on Evid.; and Roberts on Wills. Contra, — Harris *v.* Bishop of Lincoln, 2 P. Wms. 135; Pendleton *v.* Grant, 2 Vern. 517; s. c. 1 Eq. Abr. 230; Dayrel *v.* Molesworth, 1 Eq. Abr. 230; Docksey *v.* Docksey, 2 Eq. Abr. 415; but see s. c. 11 Vin. Abr. 153; Masters *v.* Masters. 1 P. Wms. 420 (N. B. a Charity case); and see per Lord Chanceller *Brougham*, in Guy *v.* Sharp, 1 Myl. & K. 602. [Kirk *v.* Eddowes, 3 Hare, 509.]

[16] Sutton *v.* Sutton, 5 Harring. 459.

[17] Mann *v.* Mann, 1 Johns. Ch. 231; s. c. affirmed, 14 Johns. 1; Jackson *v.* Sill, 11 Johns. 201.

[18] Mann *v.* Mann, 1 Johns. Ch. 231; Hyatt *v.* Pugsley, 23 Barb. 285.

* [19] Tole *v.* Hardy, 6 Cow. 333. It is here held, that evidence of the state of the

situation of the testator's children, as to property, be shown, where there was no change in the circumstances of the children, between the making of the will and the alleged revocation.[20] And the same general rules above stated, prevail in other states.[21]

15. But where the principal legatee was a slave, it was permitted to show, that such legatee was the reputed daughter of a person who had given the the testator fifteen or twenty slaves.[22]

SECTION II.

ADMISSIBLE TO SHOW FRAUD OR UNDUE INFLUENCE.

1. General statement of the rule.
2. Fraud and undue influence nearly synonymous.
3. Express fraud will always avoid a will.
4. Where the devise is upon an illegal trust.
5. Where the will is induced by a promise by the residuary legatee to provide for another.
6. The non-performance of such promise is a virtual fraud. Its performance decreed in equity.
7. Force, or imposition, in the procurement, will avoid a will.
8. Testamentary capacity of slaves, and others, in subordinate relations.
9. Swinburne, in regard to wills obtained by duress per minas, &c.
11. 14. Exposition of the more common practices upon aged people.
10. But such wills may be ratified after cause of apprehension removed.
11. It is impossible to define every species of undue influence.
12. A will in favor of the party procuring it, should clearly appear to be the offspring of choice and freedom.
13. One under guardianship prima facie incompetent to make will.
14. Unnatural or unreasonable wills, presumed to be the offspring of some perversion of mind.

testator's personal property is not receivable for the purpose of giving effect to ambiguous language in the will, as an intention to charge a legacy exclusively upon land.

[20] Betts *v.* Jackson, 6 Wend. 163.

[21] Johnson *v.* Johnson, 32 Ala. 637; Jackson *v.* Payne, 2 Met. (Ky.), 567. It is here said, that parol evidence cannot be received to contradict or add to the words of the will, but its language must be interpreted according to its terms. And extrinsic circumstances may be resorted to, for the purpose of showing the import of the terms used, but not to show directly the intent of the testator. Allan *v.* Vanmeter, 1 Met. (Ky.), 264. Some of the states have received parol evidence of intent, on the ground that it tended to explain, but not to qualify, the will, which is an unintelligible refinement. Doyal *v.* Smith, 28 Ga. 262. But see Leigh *v.* Savidge, 1 McCarter, 124; Hearn *v.* Ross, 4 Harrington, 46.

[22] Pool *v.* Pool, 33 Ala. 145.

15. If the testament is the result of over importunity it is void.
16. But constraint, to avoid the will, must have produced the act.
17. Dr. Lushington's definition of the constraint which will avoid a will.
n. 22. Free agency consists in the power to control the will, by judgment and reason.
18. All action is the compound result of the force of mind, and the resistance to be overcome.
19. The mind must possess sufficient strength to overcome the resistance.
n. 26. A will produced by fraud, in favor of innocent parties, is void.
20. But a will may be void, in part, or, as to particular legatees.
21. The precise limit of lawful influence upon a testator not easily defined.
22. Some degree of influence, which may qualify, or even produce, the will, may not be undue.
23. Eyre, C. B., illustrates the point, by that of an artful woman.
24. An undutiful testament set aside upon slight evidence of extraneous influence.
25. But one may disinherit his children if he do it freely, and understandingly.
n. 27. Swinburne's definition. It must be done freely; not to obtain quiet.
26. The influence to avoid a will, must have produced it, by design.
n. 32. Mere general influence will not be sufficient.
27. Advice, argument, and persuasion, innocent, within proper limits. But where they produce an unequal and unjust will, the presumption is, the influence, if any, was undue.
28. Reasonable provisions, produced by persuasion, at the point of death, may be valid.
n. 38. Kind offices, or persuasion, exempt from fraud or contrivance, will not avoid a will.
29. General bad treatment of a wife, by her husband, will not avoid a will in his favor.
30. Recapitulation of the degree of influence requisite to avoid a will.
(1.) The will must not be virtually the offspring of other minds than the testator's.
(2.) The influence must not have designedly produced the will.
(3.) It must not have been intended to mislead the testator to make a will contrary to his duty.
31. Testator, capable of making a will, may be affected by importunity, and not avoid the will.
32. The cases conflicting, and not always put upon sound principles.
33. The influence to avoid a will must operate, at the time it is made.
34. Will in favor of stranger prima facie good. Declarations of testator admissible.
35. The effect of testator living many years after making will.
36. The American cases allow influence, but not such as is fraudulent, or undue.
37. Juries will commonly find excuse for setting aside an unequal and unjust will.
38. The American cases require undue influence to be mala fide, and to destroy free agency.
39. Declarations of testator, of a date prior to the will, received upon this question.
40. Undue influence defined, by different terms, all importing the loss of free will.
41. Suspicious circumstances, in the relations of the parties, demand watchfulness.
42. Recognition of will, after all influence removed, evidence of its validity.
43. Ground upon which will may be set aside.
44. Bona fide effects of persuasion do not amount to undue influence.
45. But where the influence proceeds from an unlawful relation, it is unlawful.

46. It must overcome free will. Question cannot go to the jury, unless there is legal evidence.
47. Several late English cases, defining undue influence, and testamentary capacity.
48. Scrivener cannot testify to intention to have will operate from date.
49. American rule, that proof of condition of subject-matter receivable in all cases, &c.
50. Scrivener can never testify to meaning of ambiguous terms, except in latent ambiguities.
51. Statement of cases where former will, and declarations of testator, admitted, &c.
52. The burden of proof always rests upon those who oppose will.
53. The effect of influence, and inequality of distribution, upon the validity of the testamentary act.
54. Very remote circumstances tending to disprove free will, admitted in a recent case in Vermont.
55. And a still wider range was allowed in regard to proof in a late case in Michigan.

§ 38. 1. THERE are many subordinate purposes, in fixing the construction of wills, for which parol evidence is held admissible. Most of these may be reduced to a few general heads. Parol evidence is always admissible, for the purpose of showing fraud and deception, in obtaining the will. This is a very fruitful subject of litigation, in regard to the execution of wills. Such instruments, being executed, for the most part, near the close of life, after the activity and wakefulness of the mind have become, more or less, diminished, and in the majority of cases, almost destroyed; and where the testator, from the change of early associations and relations, finds himself, to a considerable * extent, surrounded by strange and embarrassing influences, and sometimes by distracting motives, tending to produce uncertainty, fickleness, and confusion in his purposes; it is not wonderful that we should find so many of the testamentary dispositions of men in advanced life, containing some unaccountable provisions, and, in many instances, presenting, as a whole, such a tissue of absurdity as to awaken suspicion, either of want of mental capacity, fraud, or undue influence.

2. Fraud, and undue influence, are so nearly synonymous, that it will not be important to enter into the definition of possible distinctions between them, since the result of either must be the same upon the testamentary act.[1]

* [1] Many of the cases have labored the distinction between fraud and undue influence. The latter is undoubtedly the more extended term, and includes a great number of cases, and an almost indefinite extent and variety of means to accomplish its purposes, which are not included in the former. So that, while undue influence embraces fraud, fraud by no means embraces every species of undue in-

3. In regard to express fraud, the cases are various. As where the testator, near the time of his decease, being pressed to execute a second will, inquired whether it was the same as the former, and was told that it was, and executed it under that impression, it was held that this testimony was admissible, to show the will thus executed fraudulent, and thus to set up the former will.[2] Lord *Kenyon*, Ch. J., here says: "I agree, that *the contents of a will are not to be explained by parol evidence; but notwithstanding," the statute of frauds, "evidence may be given to show that a will was obtained by fraud. And the effect of this evidence must be to show that one paper was obtruded upon the testator, for another, which he intended to execute." But courts of equity will sometimes set up legacies given by a testator, as against the next of kin, where the will has been fraudulently destroyed by such next of kin, before probate, in order to defeat the legacies in question.[3]

4. So also, where a devise is induced by a contract with the devisor, creating a trust, in contravention of the express provisions of statute, as the Acts of Mortmain, the devisee may be compelled to disclose the trust;[4] the purpose of the testator being found to be illegal, the devisee will be declared a trustee for the party legally entitled. This is done upon the ground, that the attempted fraud upon the statute renders the illegal trust void, but the legal title is allowed to pass to the trustee, for the benefit of the lawful cestui que trust.

fluence. There can be no question, that a will obtained by substantial fraud must be held void, in all courts, whether of law or equity. Davis *v.* Calvert, 5 Gill & J. 269, 303. Any important abuse of the testator's confidence, by making him believe unfounded imputations, against those entitled to his bounty, if done understandingly, is held fraudulent. Dietrick *v.* Dietrick, 5 S. & R. 207; Nussear *v.* Arnold, 13 S. & R. 323; Patterson *v.* Patterson, 6 id. 56; Fearon, Ex parte, 5 Vesey, 633; Devenish *v.* Baines, Prec. Ch. 3. And parol evidence may always be received to countervail a charge of fraud. Collins *v.* Hope, 20 Ohio, 492; post, n. 5.

[2] Small *v.* Allen, 8 T. R. 147. See also, Powell *v.* Mouchett, 6 Mad. 216; Lord Trimlestown *v.* D'Alton, 1 D. & Cl. 85, and other cases cited by Mr. Jarman, on this point, vol. 1, 383.

[*3] Legatees of Langdon *v.* The Heirs of Langdon, cited in 22 Vt. 50. See also, Thomason *v.* Driskell, 13 Ga. 253, where it is said parol evidence is not competent to prove the contents of a will.

[4] Strickland *v.* Aldridge, 9 Vesey, 516. In all cases where fraud or forgery is alleged, the declarations of the testator, either before or after the execution of the will, have been received. Doe *v.* Hardy, 1 Moo. & Ry. 525.

5. And where the testator, having made his will,[5] and provided an annuity of £50 for his wife, and made the defendant his residuary legatee, met him not long before his decease, and * informed him of the provision made for his wife, and that he wished her to have an annuity of £60 during her life, and if from sickness, or other accident, she should require more, that she should have it, out of his stock, and requested the defendant to see, that such annuity of £60, was paid to the plaintiff, which he promised the testator should be done, in the same manner as if it had been expressed in his will; and the witness and defendant both desired the testator to send for some one to draw a new will, but which he declined to do, saying he would leave it to the defendant's generosity, whom he informed, that he would derive a benefit under his will, to the extent of £1,000; it was decreed by the Master of the Rolls, Sir *Richard Pepper Arden*, that the annuity must be made up to £60.

6. In every case, where one induces the testator to omit a provision in his will on behalf of another, by assurances that he, being the heir, or personal representative, or residuary legatee, will see such person paid such legacy or other provision, it is treated as an estoppel, upon the party, or a virtual fraud to refuse performance, whereby a legal duty is imposed, and it will be enforced in a court of equity.[6] Thus, where the trustee of a fund, to which he would succeed in case of intestacy, prevented the making of a will in favor of a third party by promising to hold the fund for the intended legatee, the latter may recover its value as money had and received to his use.[7] And where the trustee under a will induced the

[5] Barrow *v.* Greenough, 3 Vesey, 151. In this case, the facts were admitted by the defendant under his own hand, substantially as claimed in the bill. The learned judge said, in giving judgment, "if it had not been for the written paper, I should have hesitated very much about admitting evidence against a written will. The question is, whether the confidence that the defendant would perform the trust he undertook, did not prevent the testator from making a new will. I shall make him perform it, and order him to pay the increased sum out of the assets, with costs; and if the assets are not sufficient for the costs, he shall pay them personally." See Fearon, Ex parte, 5 Vesey, 633; ante, n. 1.

[6] Chamberlain *v.* Agar, 2 Ves. & Bea. 262; Mestaer *v.* Gillespie, 11 Vesey, 638; Chamberlaine *v.* Chamberlaine, 2 Free. 34; Oldham *v.* Litchford, id. 285. And silent assent may create such a trust, as well as express words. Bryn *v.* Godfrey, 4 Vesey, 10; Paine *v.* Hall, 18 Vesey, 475.

[7] Williams *v.* Fitch, 18 N. Y. Ct. App. 546. Whether such a transaction amounts to a good donatio mortis causa is here made a query by *Comstock*, J., and the intimation is given that it would. And if made during the last sickness, and in

children of the testator to assent to the sale of certain property belonging to the estate, by a promise to leave them as much as they would get under their father's will, the trustee being also a partner with the purchasers, it was held to be a valid contract, upon sufficient consideration, and not within the statute of frauds, and enforceable in a court of equity against the estate of the trustee after his decease.[8]

7. And where actual force and compulsion is resorted to, the case is still stronger.[9] And Lord *Hardwicke* said,[10] "fraud and imposition, upon the weakness, is a sufficient ground to set aside a will . . . and yet such weakness is not sufficient to ground a commission of lunacy."

8. The law upon this subject, is carefully and curiously defined by Swinburne,[11] where he declares, that slaves cannot make * wills, but villeins may, although under some disabilities. He also says, that captives, during their captivity, cannot make wills. Neither can one who is condemned to perpetual imprisonment, although one, imprisoned for debt merely, may make a valid testament.[12] These disabilities, in regard to slaves, villeins, and captives, are derived from the Civil Law into the early English law, but have no application to the existing law of that kingdom.[13]

9. But in regard to the want of free will, resulting from the compulsion of fear, or force, the law is much the same now it was in the early times. Swinburne says,[14] that where a * testament is in-

contemplation of death, it must have amounted to a donatio mortis causa, or else an action for money had and received will not lie.

[8] Ridley *v.* Ridley, 11 Jur. N. S. 475. The early case of Reech *v.* Kennegal, 1 Ves. Sen. 123, goes upon similar grounds.

[9] Dixon *v.* Olmius, 1 Cox, 414; Mountain *v.* Bennett, 1 Cox, 353, Eyre, C. B.

[10] Lord Donegal's case, 2 Ves. Sen. 407.

[11] Swinb. part 2, § vii. p. 51.

[12] Swinb. part 2, § viii. p. 54.

[13] 1 Wms. Exrs. 41.

[14] Part 7, § ii. It is obvious, in practice, that by far the largest proportion of wills, procured by undue influence, is brought about by flattery and affected devotion; and that comparatively a very small number are induced, either by force, or actual menace. It is well known, that in extreme old age, the nervous system, not unfrequently, becomes more than ordinarily sensible of intimidation. So that many persons, who, in middle life, were resolute and firm, and not easily excited by dread, or apprehension of evil, become timid and fearful, like feeble women, or children, and are in constant dread of injury, or loss of comfort, from those in whom they have formerly reposed the utmost confidence. In some cases, this result is a

duced by fear, it is of no force, "not only in respect of that person who put the testator in fear, but in respect of other persons also, albeit ignorant of that fear, wherewith the testator was constrained in their behalf." And again, that although the fear, or threat, be not of present execution, it nevertheless avoids the testamentary act, so long as it operates upon the mind of the testator. This writer attempts a distinction between "just fear, and vain fear," which, indeed, runs through the books, upon many other questions, but which must, as here said, "be left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons, as well threatened, as threatening; and in the threatened, the sex, the age, the courage, or pusillanimity; and in the person threatening, the power, the disposition, and whether he be a mere boaster, or a performer of his threats."

10. It seems clear, that if one made a will, while under the influence of fear or compulsion, he may so ratify and confirm it, after all apprehension is removed, as to render it valid.[15]

merely morbid sentiment, which has supervened, in consequence of increasing infirmity, and not from the ill treatment, or misconduct, of those who have thus unconsciously, and without fault, become the objects of such apprehension, or horror. In such cases, it must be regarded as a morbid delusion, and where the will is shown to be the offspring of the delusion, it must be considered invalid, just as much as if the state of mind of the testator had been induced by intentional abuse. In other cases, the terror is brought about by positive severity and abuse, and the apprehension is not without foundation, although greatly exaggerated, perhaps. Here, we apprehend, it is not of much importance, whether the cause is, in fact, adequate to the production of such a degree of intimidation, but the question always is, whether the testamentary act may fairly be regarded, as the offspring of an existing fear and constraint, operating upon the mind of the testator, and producing such a will, as he would not otherwise have made. And when it is said by Swinburne, supra, and repeated by later writers, 1 Wms. Exrs. 41, "A vain fear is not * enough to make a testament void, but it must be such a fear as the law intends, when it expresses it by a fear that may cadere in constantem virum, as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all, or most part of one's goods, or the like;" we are to regard this, rather as a means of judging, when the fear was bona fide and sincere, and when it is to be regarded as merely fictitious and simulated, either by the testator, or by the witnesses, who depose to its existence. For every one must be aware, that in all such inquiries the real question will always be, not so much what was the foundation of the testator's apprehensions of evil, as to what extent did his belief in the imminent danger of such perils, deprive him of the exercise of his free will, in the act of making his testament?

[15] Swinb. part 7, § ii. pl. 8; 1 Jarman, Perk. ed. 1860, 38; 1 Wms. Exrs. 41;

11. In regard to undue influence, which is a species of fraud, the cases are almost infinite, in number and variety. It is not possible to reduce them into any systematic classification. All * that we deem practicable, in that direction, will be to give a brief abstract of the points ruled in some of the leading cases, and a mere reference to others, and, in the end, state succinctly, what we regard as the fair conclusion, from all the cases upon the subject.

12. Where the party, to be benefited by the will, has a controlling agency, in procuring its formal execution, it is universally regarded, as a very suspicious circumstance, and one requiring the fullest explanation. Thus, where a will was written by an attorney, or solicitor, who is to be benefited by its provisions, it was considered that this circumstance should excite stricter scrutiny, and required clearer proof of capacity, and the free exercise of voluntary choice.[16]

13. So also, where one, under guardianship, as non compos, made a will, appointing his guardian executor, and giving him a legacy, it was held, that the testator might make his will, notwithstanding the guardianship, if he was, in fact, of sound mind at the time of its execution, but that the guardianship, being prima facie evidence of incompetency to make a will, this, together with the other circumstances in the case, made it incumbent upon the executor to show, that the testator had both the capacity, and the freedom of will and action, requisite to its proper exercise.[17]

14. So where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his

O'Neall *v.* Farr, 1 Rich. 80. And it would seem, that preserving the will, after the cause of fear is removed, might rebut all presumption of fraud or undue influence.

[16] Duffield *v.* Robeson, 2 Harring. 384. See also, Tomkins *v.* Tomkins, 1 Bailey, 92; Crispell *v.* Dubois, 4 Barb. 393; Beall *v.* Mann, 5 Ga. 456; Newhouse *v.* Godwin, 17 Barb. 236. In a very recent English case, Edmonds *v.* Lewer, 11 Jur. N. S. 911 (1865), where the plaintiff propounded as a will a paper purporting to have been executed by a marks-woman, in the presence of two attesting witnesses, who also attached their marks thereto, the whole body of the will, and the names of the supposed testatrix and the witnesses, being in the handwriting of the plaintiff, and the paper, although in the custody of the plaintiff, not being offered for probate for many years after the death of the testatrix, evidence being given of the execution of this paper in the presence of two witnesses by some person, but except by the testimony of the plaintiff, such person not being identified as the deceased, the court refused probate.

[17] Breed *v.* Pratt, 18 Pick. 115, 117.

property and family, or what the Civilians denominated an inofficious testament, this of itself, will impose upon those, claiming under the instrument, the necessity of giving some reasonable explanation of the unnatural character of the will, or, at least, of showing that its character is not the offspring of mental * defect, obliquity, or perversion. As where it appeared, that the testator's mind was so far impaired by disease, as to render him an easy dupe to the arts and intrigues of those by whom he was surrounded, and that, while in a bedridden and paralytic state, the will was procured by taking advantage of his condition, by which he made a different disposition of his property from what he otherwise would have done, it was held, that the will could not be admitted to probate.[18]

15. So also, if a man makes a will, from the over importunity of another, as was said by *Rolle*, Ch. J.,[19] "to the end he may be quiet," such will is not valid. But the extent of such over persuasion, importunity, or undue influence, it is very difficult, if not impossible, to define. A very learned and experienced English judge of the ecclesiastical courts, Sir *John Nicholl*,[20] says it must be, in such a degree, as to take away from the testator his free agency; such as he is too weak to resist; such as will render the act no longer that of a capable testator.

16. The constraint which will avoid a will must operate upon the testator, in producing the very act of making his will.[21] Threats long past, and not appearing to be in any way connected with the testamentary act, will not avoid it.

17. In a most elaborate opinion of Dr. *Lushington*,[22] it seems * to be assumed, that in order to invalidate a will, even in the case of

[18] Clark *v.* Fisher, 1 Paige, 171. This was an appeal from the decision of the surrogate, in allowing the probate of a will.

[19] Hacker *v.* Newborn, Styles, 427. See also, Moneypenny *v.* Brown, 8 Vin. Ab. 167; Tit. Devise (Z. 2), pl. 7; Lamkin *v.* Babb, 1 Cas. temp. Lee, 1; Harwood *v.* Baker, 3 Moore, P. C. C. 282.

[20] In Kinleside *v.* Harrison, 2 Phillim. 551, 552.

[21] McMahon *v.* Ryan, 20 Penn. St. 329; Jenckes *v.* Court of Probate, 2 R. I. 255; Batton *v.* Watson, 13 Ga. 63; Chandler *v.* Ferris, 1 Harring. 454; *Clayton* Ch. J., id. 464.

[22] Stulz *v.* Schaeffle, 16 Jur. 909; s. c. 18 Eng. L. & Eq. 576. The learned judge here quotes Williams *v.* Goude, 1 Hagg. 577, and Armstrong *v.* Huddlestone, 1 Moore, P. C. C. 478, and adds: "It was observed, that the influence to vitiate an act, must amount to force and coercion, destroying free agency. The * testator, therefore, must be a free agent; by which I apprehend must be meant, that he must have the power, if he had the will, to do or not to do, any given act.

one of weak mind, there must be evidence, either of * "coercion, or positive fraud." The learned judge said: "What law can decide, what is the degreee of influence which a wife can exercise over a husband, sufficient to invalidate acts done under it? What may be the motives upon the mind of the testator? Put the case in the strongest point of view — fear of displeasing, fear of future solicitation, love of peace, or it may be, deference to superior judgment, or affection and regard. Who is to dive into these motives? What evidence can any tribunal have? Coercion may, indeed, be capable of proof, and in such case no act would be valid." And it is added, that although the testator was enfeebled in mind, he had

Whether a testator be a free agent or not, as there is no possible means of penetrating into the motives by which he is actuated, must be judged of by his acts, deeds, and all the surrounding circumstances." This is obviously a very imperfect definition of the degree of influence which will destroy testamentary capacity, since, in the majority of instances, the difficulty in regard to freedom is not, in not having the power to follow the will, but in not having the power to control the will. All overpowering influence, whether of affection, or fear; of love or dread, becoming irresistible, from the fact that it absorbs and swallows up the will, and thus virtually intrudes another person's purposes, into the purposes of the testator, and so, in effect, destroys his personal independence, and virtually his identity. All have seen numerous instances of this character, who have been much conversant with testamentary causes in the courts of justice. An aged man or woman comes to depend upon some near relative or friend, for society, consolation, and comfort. He will not go out or come in, ride or walk, eat or sleep, unless so advised, by his familiar spirit. This influence may have been gained by unwearied assiduity, and dutiful, loving attentions; and it may have been done with the expectation, and the desire, to have a remembrance, and a reward, in the will of this person; and this expectation may have been made known to the testator, in all good faith, and at his desire, and even the amount of the legacy discussed, between the testator and the legatee. And it may be true, that the testator was more influenced, by the mind of the legatee, than his own mind, or even that he was morally incapable of acting, contrary to what he believed the will of his best earthly friend. Shall all this avoid the bequest? Certainly not, unless it is unreasonable, and so much so, as to show that it must have been the offspring of undue influence. Hence, in all cases of this kind, the validity of the testamentary act will depend more upon the abuse of a controlling influence, than upon the fact of its existence; more upon the fact that the testator was not fairly dealt with, and not left free to pursue his own natural and healthful instincts, and reasonable duties, than that the legatee had the power to control his will.

There are numerous cases in the courts where, if the validity of a testamentary act were made to depend upon the power of the testator to act in opposition to the will of others, the will must fail, when, in consequence of no such constraint being in fact brought to bear upon the will of the testator, it is entirely valid, because entirely reasonable, and therefore, presumably, entirely free.

the power of resistance, and that there was not the slightest evidence of importunity, and the court, therefore, pronounced for the will.

18. It is obvious that each case must depend very much upon its own circumstances. These questions will not be likely to arise, except in regard to persons, naturally of weak minds, or facile dispositions, or where such has become their condition, either from age or disease. And in regard to such persons, it must, of course, be only an influence adequate to control the free agency, which is required to avoid the will, and the character and degree of such influence will depend, very much, upon the strength of mind, and will, to be overcome by it.[23]

19. The rule upon this subject is very carefully defined by Mr. Chief Justice *Buchanan*,[24] thus: "A testator should enjoy full liberty and freedom, in the making of his will, and possess the power to withstand all contradiction and control. That degree, therefore, of importunity, or undue influence, which deprives a testator of his free agency; which is such as he is too * weak to resist, and will render the instrument not his free and unconstrained act,[25] is sufficient to invalidate it; not in relation to the person alone, by whom it is procured, but as to all others, who are intended to be benefited by the undue influence." "If a man, by occasion of some present fear, or violence, or threatening of future evils, does at the same time or afterwards, by the same motive, make a will, it is void, not only as to him who puts him so in fear, but as to all others." [26]

[23] O'Neall *v.* Farr, 1 Rich. 80; Thomson *v.* Farr, 1 Speer, 93; s. c. Cheves, 37; Martin *v.* Teague, 2 Speer, 268, 269; Tomkins *v.* Tomkins, 1 Bailey, 92; Chandler *v.* Ferris, 1 Harr. 454, 464; Brown *v.* Molliston, 9 Wharton, 137; Leverett *v.* Carlisle, 19 Ala. 80; Potts *v.* House, 6 Ga. 324; Wampler *v.* Wampler, 9 Md. 540; McMahon *v.* Ryan, 20 Penn. St. 329.

[24] Davis *v.* Calvert, 5 Gill & J. 302, 303.

[25] Small *v.* Small, 4 Greenl. 223.

[26] Bridgman *v.* Green, 2 Vesey, 627; Huguenin *v.* Baseley, 14 Vesey, 273, 282. The general proposition, that interests, obtained through the fraud of another, cannot be maintained, is here decided, and Lord *Eldon*, in giving judgment, said: "I should regret that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence, of others." And when the case of Bridgman *v.* Green came before the Lords Commissioners, Lord Ch. J. *Wilmot*, Wilmot, Term Notes, 64, said: "There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due, or

20. It is undoubtedly true, that a will may be void in part, and not in all its provisions; or it may be void as to one legatee, and not as to others.[27]

21. The proper limit of influence, which may legitimately be brought to bear upon the mind of a testator, to induce the making of a will in a particular direction, and at what precise point such influence becomes what the law denominates undue, and such as will avoid the testamentary act, it is not easy to define.* It can only be done by approximation, and by way of illustration, from the cases already decided in regard to the question.

22. It is confessedly true, that a will is not avoided by every degree of influence, which may be shown to have operated in producing the testamentary act, or even that without which it would not have been done, or if done, not in the same form. The question is at what point such influence becomes undue.

23. The extent of such influence is very justly discussed, by *Eyre*, C. B., in Mountain *v.* Bennett.[28] The learned baron said: "If a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs in *general;* yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind" [as if actual force were resorted to]; "and perhaps the most probable instance of such a dominion being acquired is that of an artful woman . . . having taken possession of a man and subdued him to her purposes." It is said, the overpowering influence of the husband upon the mind of the wife, will be more readily presumed than the reverse.[29]

undue influence, over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it, must take it, tainted and infected with the undue influence and imposition of the person procuring the gift. . . . Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."

[27] Lord Trimlestown *v.* D'Alton, 1 Dow & Cl. 85; s. c. 1 Bligh (N. S.), H. L. Cas. 427, where it is held, that the provisions of a will in favor of a particular party, procuring the will in his favor by undue influence, are void, and the others valid. But if the influence extends to the whole will, the whole will be declared void. Florey *v.* Florey, 24 Ala. 241.

[*28] 1 Cox, 355.

[29] Marsh *v.* Tyrrell, 2 Hagg. 84–141. The language of Swinburne, part vii. ch. iv. is very expressive upon this point, as upon most others: "It is not unlawful for a man, by honest intercessions and modest persuasions, to procure either

* 24. As is said in Swinburne, it is certain the courts cannot assume to measure and to guard against every species of influence which may be brought upon the testator, to give his property in a particular direction. It is only that degree of influence which deprives the testator of his free agency, and makes the will more the act of others than of himself, which will avoid it. Hence any thing in the character of the will which renders it contrary to natural affection, or what the Civil Law writers denominate an undutiful testament,[30] as where children, or others, entitled to the estate, in case of intestacy, are wholly disinherited; or if not wholly deprived of a share, it is given in such unequal portions as to indicate that it is done without any just cause, and wholly dependent upon caprice, or over persuasion, or deception, it must always excite apprehension of undue influence, at the very least.

25. But it is not to be supposed that the courts would adopt any such view of the law, as virtually to deprive the testator of the right of disinheriting his children even, upon any ground satisfactory to himself. The Roman law[31] did indeed prohibit this, except upon certain allowable grounds, specifically defined, but the English law, and that of the American states, makes no such limitation of testamentary power.

another person or himself to be made executor; neither is it altogether unlawful for a man, even with fair and flattering speeches, to move the testator to make him his executor, or to give him his goods." The author notes certain exceptions to this rule, among which are, the use of force, fraud, and deceit; "where the testator is a person of weak judgment, and easy to be persuaded, and the legacy great;" where the person has peculiar means of influencing the testator, as his physician, or wife, threatening to desert him, in the extremity of sickness; "where the persuader is very importunate, for an importunate beggar is compared to an extorter, and it is an impudent part still to gape and cry upon the testator, and not to be content with the first or second denial." And lastly, where the testator had made a former will, and is persuaded to revoke and alter it. These propositions will be found to contain the germ of all the cases upon the point. So also, in Hacker *v.* Newborn, Styles, 427. *Rolle*, Ch. J., said: "If a man makes a will in his sickness, by the over importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will." Moneypenny *v.* Brown, 8 Vin. Ab. 167, tit. Devise (Z. 2), pl. 7; Lamkin *v.* Babb, 1 Cas. temp. Lee, 1; Harwood *v* Baker, 3 Moore, P. C. C. 282. A will produced by improper influence ought not to be established, even where the parties injured do not complain. Brown *v.* Moore, 6 Yerger, 272. See Denslow *v.* Moore, 2 Day, 12, as to what kind and degree of coercion will defeat a will.

[30] 2 Domat, Civ. Law, part ii. book iii. tit. 2.

[31] 2 Domat, part ii. book iii. tit. ii. sec. 1.

26. It is sometimes said, that no degree of influence over * another, which is general, and operating at all times, and upon all subjects, and which is not specifically exerted to procure the testament in question, will be sufficient to avoid it.[32]

27. It may be safe to adopt the language of Ch. J. *Clayton*,[33] that "neither advice, nor argument, nor persuasion, would vitiate a will made freely, and from conviction, though such will might not have been made, but for such advice and persuasion." It was well said by Chief Justice *Buchanan*,[34] that "it is not * every degree of importunity that is sufficient to invalidate a will or testament. . . .

[32] Small *v.* Small, 4 Green. 220. This is an important case, and the opinion, by Chief J. *Mellen*, affords an able commentary upon the law. The learned judge says: "If a wife by her virtues has gained such an ascendancy over her husband, so riveted his affections, that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct, in the general concerns of life, unless there should be proof that such influence was especially exerted, to procure a will of such a kind, as to be peculiarly acceptable to her, and to the prejudice and disappointment of others." This seems to define the true limits of influence to avoid a will. It is not sufficient to show that such general influence existed to any extent, unless there is proof that it was exerted in procuring the particular testamentary act in question. But where the influence is shown to have been absolute, and irresistible over the testator, upon general subjects, and there were constant opportunities of exerting such influence, and the will is unreasonably, and extravagantly, in favor of the party possessing such influence, the inference is legitimate, that it was the result of that influence. And such is unquestionably the fair conclusion, in most cases, even although there should be probable evidence, that no effort had been made in that direction, for some considerable period before the will, by the person possessing the control of the testator, and in whose favor the will is made; as if it were executed in the temporary absence of such person. The obvious and natural connection, between the power to control, and the testamentary act, being established, although mainly by their coincidence and adaptation to each other, the presumption will naturally arise, that the temporary withdrawal of such effort at influence did not relieve the testator wholly from its effects.

[33] In Chandler *v.* Ferris, 1 Harring. 454, 464.

[34] In Calvert *v.* Davis, 5 Gill & J. 301, 302. In Martin *v.* Teague, 2 Speer, * 268, 269, it is said, the influence, to render a will void, must be intentionally exercised, so as to overcome free agency, by the seduction of flattery, importunity, false information, or menaces. The influence resulting from habitual confidence, or even deference on the part of the testator, inspired by affectionate attentions, or general kindness, will not be sufficient for that purpose, unless addressed to a mind of unresisting imbecility, and which had lost the power of self-direction.

But there may be great and overruling importunity, and undue influence, without fraud, which, when established, may and ought to have effect (under circumstances), to avoid a will or testament, such as the immoderate, persevering, and begging importunities and flattery of a wife who will take no denial, pressed upon an old and feeble man, which may be better imagined than described; or dominion obtained over the testator under the influence of fear, produced by threats, violence, or ill treatment. In neither of these instances may there be any direct fraud; but an overruling influence upon the mind and feelings of a testator, according to the degree of his judgment and firmness." The cases all seem to agree that the influence which shall deprive one of the testamentary power, must go to the extent of destroying free agency.[35] And where it appears that efforts were made, by interested parties, or those who acted on their behalf, to induce a will, in a particular direction, and the will seems to have been the result of such efforts, and is unfair, and unjust, in its provisions, it is natural, and, we think, just, to conclude that the influence did destroy free agency, or it could not have produced such a result.

28. It has been decided,[36] that importunities of the wife, to induce her husband, when at the point of death, to make more * liberal provision for her, than he is disposed to make, and which prevails in its purpose, will not avoid the will, if the testator was of sound mind, and was not imposed upon by false representations, and that the provision made for the wife was not greatly disproportionate and unreasonable.

29. General bad treatment of the wife, on the part of the husband is not sufficient to avoid a will, made by her, in his favor.[37]

30. From all this, and much more, which might be adduced from the cases already decided, it is obvious, that the influence to avoid a will must be such as:

1. To destroy the freedom of the testator's will, and thus render

[35] *Evans*, J., in O'Neall *v.* Farr, 1 Rich. 80–84.

[36] Lide *v* Lide, 2 Brevard, 403. Mr. Justice *Carpenter*, in Trumbull *v.* Gibbons, 2 Zab. 117, thus sums up the rule upon this point: "It is not the influence acquired by kind offices, or even by persuasion, unconnected with fraud or contrivance, that will avoid a will."

* [37] M'Mahan *v.* Ryan, 20 Penn. St. 329; Jenckes *v.* Court of Probate, *Green*, Ch. J., in 2 R. I. 255; Batton *v.* Watson, 13 Ga. 63; *Clayton*, Ch. J., in Chandler *v.* Ferris, 1 Harr. 454, 464.

his act, obviously more the offspring of the will of others, than of his own.[38]

2. That it must be an influence specially directed towards the object of procuring a will in favor of particular parties.

3. If any degree of free agency, or capacity, remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence, which so controls him as to * render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will, essentially contrary to his duty; and it must have proved successful, to some extent, certainly.

31. For we do not suppose, that if the testator is capable of making a valid will, when left to himself, his testamentary act is to be rendered nugatory, by the honest importunity of a wife, to obtain only what she deems her fair share of his estate, and which only prevails to that extent, although it could be shown that, without such importunity, the testator would have given her much less. And the same may be said of other relations fairly entitled to the testator's bounty. And although it may be justly said, that good faith is no fair criterion of justice and propriety, in the measure of the importunity of solicitors for testamentary bounty: yet, if the importunity is only successful to the extent of justice and propriety, its results, to that extent, can scarcely be condemned, because their author would gladly have carried them beyond that limit.

32. The cases, which have been decided upon this point, are almost infinite, in number and variety, and it would not be wonderful, if the principles, upon which they have been decided, were not always very obvious, or, when discoverable, if they were found somewhat in conflict.

[38] Williams *v.* Goude, 1 Hagg. 581. It is repeatedly said, in the cases, that the influence to avoid a will must not be that of affection merely, as in the case last cited, and in Armstrong *v.* Huddleston, 1 Moore, P. C. C. 478; Miller *v.* Miller, 3 S. & R. 267. But this must be received with this qualification, that such influence be not abused to purposes of injustice. For although it may be true, that one who has gained a controlling influence over another, by kind offices of duty or affection, is not thereby rendered incapable of receiving a liberal testamentary gift from such person, for if that were to be so held, it would offer, so far as it had any influence, a direct temptation to coldness and reserve, on the one hand, and distrust on the other; still it is not true, that if one should abuse the influence of affection, to the purpose of obtaining an unjust, and unequal, advantage over others, equally entitled to the testator's bounty; and do this, to the extent of overcoming free agency, or by means of fraud and deceit, it will not avoid the will.

33. We have before intimated, that the influence which avoids a will, must be one still operating at the time the will is made, and producing that perversion of mind which made the will.[39]

34. Although the fact that the testator makes a will, in favor of one not a relation, may be suspicious, nevertheless, affirmative proof of undue influence will be required to invalidate it.[40] * And it is obvious, that in cases of alleged undue influence, it must have a very controlling effect upon the validity of the will, whether the testator's previous declarations of affection and intention confirm the will or not.[41]

35. So also, it must always have considerable weight in favor of the validity of a will, where the testator lived many years after its execution, and was confessedly relieved from the influence of the alleged infirmity of mind, or defect of freedom, by which it is attempted to be set aside, without making any alteration in, or revoking the same. For it is always the proper inquiry, in regard to undue influence, whether it operated, as part of the transaction of making the will in question. And as that is an act, always ambulatory, during the life of the testator, his conduct after its execution is entitled to some weight, in determining its validity. But this depends so much upon the circumstances of each particular case, that it is not easy to lay down very minute rules, by which to estimate the weight of such considerations.[42]

36. This question has been very extensively discussed, in many of the American courts, and it is clearly established, by many cases, in different states, that the influence of a child, or wife, or of a friend, if exerted, in a fair and reasonable manner, and without deception, or imposition upon the testator, and while he had capaci-

* [39] Ante, pl. 16, n. 21, 22.

[40] Jenckes *v.* Court of Probate, 2 R. I. 255. And the fact, that the testator used words, the legal effect of which is to carry a fee, when the proof shows, that he only intended to devise a life-estate, is no sufficient ground to presume fraud, or undue influence. Gibson *v.* Gibson, 9 Yerger, 329.

* [41] Allen *v.* Public Administrator, 1 Bradf. Sur. Rep. 378. In the very recent case of Neel *v.* Potter, 40 Penn. St. 483, where undue influence was attempted to be proved upon the devisees, — two of his own name and blood, — it was held competent for them to prove in reply, that the testator had made declarations, at intervals, during a period of many years, that he intended "to leave his farm in the name of Neel," for it would rebut the idea of undue influence, by showing that the testator had made his will, in accordance with a long-cherished purpose.

[42] Kelly *v.* Theules, 2 Ir. Ch. 510.

ty to deliberate, and estimate the inducements offered, will not avoid a will, when made in favor of such party.[43]

* 37. And it is sometimes said, that where capacity, formal execution, and volition, all appear, no tribunal can pronounce against the will, because of its disapprobation, however strong it may be, of the dispositions made by the testator.[44] But in practice, we have always found juries disposed to infer undue influence, or want of proper capacity, or both, where the will itself seemed to indicate, in a high degree, injustice and want of proper consideration in the testator, if there was the slightest evidence in support of it. And although, in theory, either want of capacity, or undue influence, require distinct and satisfactory proof, we could never feel any strong impulse to interpose, in behalf of an absurd, or unjust, and unequal will, in order to withstand the common-sense instincts of a jury against the validity of such an instrument.

38. The cases, in the American courts, all seem to come nearly to the same point, already indicated, as being the true test of undue, or fraudulent, influence, that it must be exerted *male fide*, to produce a result, which the party, as a reasonable person, was bound to know was unreasonable and unjust; and it must have the effect of producing illusion or confusion, in the mind of the testator, so as either to overcome his free agency, or power of judging, upon the true relations between himself and * those who might be supposed to have just claims upon his bounty.[45]

[43] Elliott's Will, 2 J. J. Marshall, 340; Miller *v.* Miller, 3 S. & R. 267; * Moritz *v.* Brough, 16 id. 403; Harrison's Will, 1 B. Mon. 351. The same rule, for substance, in regard to freedom of action by the testator, will apply where undue influence is charged, as in regard to many other points already discussed, where testamentary capacity comes in question. The real question in all these cases is, whether the paper propounded be the act of the testator, or of some other person or persons. Hence, undue influence should amount to coercion, to avoid the will. Gardner *v.* Gardner, 22 Wend. 526; Lowe *v.* Williamson, 1 Green, Ch. 82. The witnesses should be satisfied the testator acts understandingly. *Walworth*, Chancellor, in Scribner *v.* Crane, 2 Paige, 147. The fact that one makes a will in extremis in favor of those around him, and makes no provision, or an inadequate one for his children, is entitled to great consideration as evidence of fraud. Goble *v.* Grant, 2 Green, Ch. 629.

[44] Ross *v.* Christman, 1 Ired. Law, 209.

* [45] Floyd *v.* Floyd, 3 Strobh. 44; Woodward *v.* James, id. 552; Means *v.* Means, 5 id. 167. And it is not important that it be practised, at the very time of executing the will. Influence, exercised at any time, the effect of which is to produce the will, without the fair concurrence of the mind of the testator, is sufficient.

39. It is upon the ground of apprehension, that the will may not be the act of the testator, that his previous declarations of an intention to have made a different, or a similar will, are received. But such declarations, evidently diminish in importance and weight, in proportion as they are remote from the date of the will; and especially, as the grade of the testator's capacity increases; and they have no value whatever, where the mind is sound and vigorous.[46]

40. Different cases, in defining undue influence, adopt different terms, as that it must amount to moral coercion;[47] or to constraint;[48] or to force or fear, but less, will be sufficient in a weak mind;[49] or that it must overcome the natural desire and preference of the testator.[50]

41. In all cases, where there are special grounds for apprehending undue influence, greater watchfulness should be exercised by the court. As where the testator was of advanced age, his hearing slightly affected, and his sight very seriously impaired, any traces of imposition, or artifice, should be carefully examined. But care should be exercised, not to confound kind * offices, and faithful services, with positive dictation and control exercised over the mind of the testator.[51] But where the will is made, by a client, in favor of his professional adviser, although not void, on that ground alone, as to the party thus situated, especially where the testator was in the full possession of his mind and memory, and there are no traces of circumvention, or fraud; yet, under the opposite state of facts, in either particular, it would be difficult to establish the will.[52]

Davis *v.* Calvert, 5 Gill & J. 269; Taylor *v.* Wilburn, 20 Mo. (Bennett), 306. See also, Hearn *v.* Ross, 4 Harrington, 46.

[46] Tunison *v.* Tunison, 4 Bradf. Sur. Rep. 138. It is here said, there is nothing unlawful in suggestion, if it be not carried to the degree of importunity, and the testator be in the full possession of his faculties. Post, § 39. See the late case of Sechrest *v.* Edwards, 4 Met. (Ky.) 163.

[47] Potts *v.* House, 6 Ga. 324.

[48] Sutton *v.* Sutton, 5 Harr. 459.

[49] Morris *v.* Stokes, 21 Ga. 552.

[50] Leverett *v.* Carlisle, 19 Ala. 80; Dunlap *v.* Robinson, 28 id. 100; Taylor *v.* Kelly, 31 id. 59; Marshall *v.* Flynn, 4 Jones, Law, 199.

[51] Weir *v.* Fitzgerald, 2 Braf. Sur. Rep. 42.

[52] Wilson *v.* Moran, 3 Bradff. Sur. Rep. 172. The circumstances, here enumerated, as indicating the absence of undue influence, are the absence of the party to be benefited, at the execution of the will; its conformity with the wishes of the testator, expressed at other times, and to other parties, and the lapse of a considerable time, after the execution of the instrument, without any attempt to revoke

The existence of that fiduciary relation does not annul the testamentary act, in favor of the attorney, by his client; but such fact calls for watchfulness, lest some improper influence may have been exercised. There should be very clear evidence of mental capacity, and proof, independent of the factum, that the mind, free and unbiassed, accompanied the act. The mere knowledge of the beneficiaries, under such circumstances, that a favorable will was to be *executed*, is not sufficient to invalidate the instrument.[52] And the same rule has been extended to similar relations; as where a wife makes a will in favor of her husband, or a ward in favor of his guardian.[53]

42. It has been decided, that a will, made under undue influence, is so absolutely void, that it cannot be rendered valid, by any subsequent recognition, unless in writing, and so executed as to amount to a republication.[54] But we apprehend that any recognition of the will, after its execution, if made when no * undue influence continued to operate upon the testator, is competent evidence to show that it was not improperly obtained.[55]

43. Undue influence has been defined, as that which compels the testator to do that which is against his will, through fear, or the desire of peace, or some feeling which he is unable to resist, and "but for which the will would not have been made as it was."[56] No legal presumption of undue influence arises, from the facts, that the testator was of weak mind, addicted to drink, and nigh unto death, and that he was surrounded by those, principally benefited by the provisions of the will, while his relatives were away, and that the provisions of the will were unnatural; but the jury may infer undue influence from these facts.[57]

it, when the testator retained the full possession of his faculties, and was free from any pretence of the influence of the party implicated.

[53] Morris *v.* Stokes, 21 Ga. 552.

[54] Lamb *v.* Girtman, 26 Ga. 625.

[55] Taylor *v.* Kelly, 31 Ala. 59; ante, pl. 10.

[56] Blakey *v.* Blakey, 33 Ala. 611; Taylor *v.* Kelly, 31 Ala. 59.

[57] Poole *v.* Poole, 33 Ala. 145. Where undue influence and fraud in procuring the will are charged, proof of motive is admissible. Lucas *v.* Parsons, 27 Ga. 593. Where the will was executed and witnessed by strangers to the testatrix, who could neither read nor write, at a distance from her home, where she was carried by the principal devisee, a son; and others of her children, for whom she appeared to have an equal affection, were kept entirely ignorant of the fact of the existence of any will, until after the decease of the testatrix; and where she, at the time of execution, declined to have it read to her, saying, "that it was her will, and she

44. A will induced by persuasion, or flattery, is not there by rendered invalid.[58] But if, from age or imbecility, a testator is induced to change his will, contrary to his intentions, and against * his wishes, the instrument cannot be maintained.[59] But a child is allowed to use fair argument, and persuasion, to induce a parent to make a will, or deed, in his favor.[60]

45. In a very late case,[61] the question of the difference between a lawful and an unlawful relation, upon the mind of the testator, in producing a will in the direction of such influence, is very thoroughly considered. It is here held, that the influence of a lawful relation, over testamentary dispositions, is not prohibited by law, except where unlawfully exercised over the very act of devising; but that of an unlawful relation, is naturally and ordinarily unlawful, in so much as it respects testamentary dispositions, favorable to the unlawful relation, and unfavorable to the lawful heirs. In this case, the testator, having a wife and one child, a daughter, separated from them, many years before his death, and formed an adulterous connection with another woman, who had a husband living, and continued this connection, until the time of his death; his paramour being his nurse, during his last sickness, and at all times exercising a most despotic control over his opinions and conduct. The court held, that the will, being made during the subsistence of such a relation, and disposing of all his estate to the daughters of the particeps in such adulterous connection, and to the entire exclusion of his own daughter, and only heir, was evidence of an undue influence, exercised over the free will of the testator, by such particeps, and directed a new trial, that such evidence might be submitted to the jury. The opinion by Ch. J. *Lowrie*, is worth of careful study: "The will of a man who has testamentary capacity, cannot be avoided merely, because it is unaccountably contrary to the common

knew what was in it;" it was held, that although the testatrix's knowledge of the contents of the will is to be proved, in the same manner as in ordinary cases, yet the jury should be cautioned not to rely upon her declarations made at the time of the execution, if they believed she had relied upon statements made to her by the son, at whose instance she executed the will, and that the proof of her knowledge of the contents of the will should be clear and convincing, equal to reading it, or hearing it correctly read. Watterson *v.* Watterson, 1 Head, 1.

[58] McDaniel *v.* Crosby, 19 Arkansas, 533.

[59] Sutton *v.* Sutton, 5 Harring. 459.

[60] Gilreath *v.* Gilreath, 4 Jones, Eq. 142.

[61] Dean *v.* Nagley, 41 Penn. St. 312.

sense of the country. His will, if not contrary to law, stands for the law of descent of his property, whether his reasons for it be good or bad, if indeed * they be his own, uninduced by unlawful influence from others. Lawful influence, such as that arising from legitimate family, and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the facts that it is known to have existed, and that it has manifestly operated on the testator's mind, as a reason for his testamentary dispositions. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them, so as to attribute to them their proper effect, no will can be condemned because the existence of such an influence is proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and, therefore, to the law itself, if we should apply this rule to unlawful, as well as to lawful relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects, and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence, over the kind of act that is under investigation. In their legitimate operations, those positions of influence are respected; but where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably * regarded. The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions; for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions, favorably to the unlawful re-

lation, and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right, because the relation is lawful; and in the latter it may be condemned, together with its effects, because the relation is unlawful. It is not inconsistent with this, that it has been decided, that the devise of a wife to her second husband, was not affected by the fact that she knew she had a husband living at the time of her second marriage, even though the second husband heard of it before her death; for this shows no conscious transgression of law by him, in his marriage with her, and her heirs could not set up her fraud on him, as a reason for avoiding her will.[62] There can be no doubt, that a long-continued relation of adulterous intercourse, is a relation of great mutual influence of each, over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life, or very close observation of persons around us, in order to reveal the fact. . . . . If, then, there was such a relation between the testator and Mrs. Bolton, at the time of the making of the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence, exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a presumption of law of undue influence, but we do not so decide, but leave it as a question of fact merely."

46. The question came again under consideration before the * same court, in a still more recent case,[63] where it was declared, that undue influence, to avoid a will, must be such as to overcome the free agency of the testator, at the time the instrument was made. It must be a present constraint, operating upon the mind of the testator, at the time of the testamentary act. And where undue influence was charged upon the executor, and no evidence was given of any influence exerted by him over the testatrix, at the time of making her will, nor of any fraud, misrepresentation, or constraint of any kind, whatever, in procuring a will in his favor, it was held to be error to submit the question to the jury, whether any such undue influence had been exerted by him.

47. The subject of undue influence, in procuring favorable tes-

* [62] 8 Harris, 329.

* [63] Eckert *v.* Flowry, 43 Penn. St. 46.

tamentary dispositions of property, has been often brought before the English Court of Probate, within the last few years. In the case of Earl Sefton *v.* Hopwood,[64] it was held, that supposing a will to be made by a person of testamentary capacity, it is not sufficient to avoid it, that it is not such a will as a sensible person would make, or that it is harsh, capricious, and unjust; nor, on the other hand, is it sufficient to avoid it, on the ground of undue influence, that it was made, as the result of acts of attention and kindness; but the influence, or importunity, must be such as to deprive the testator of the free exercise of his will. The testamentary capacity, however, involves more than the mere fact of recognizing familiar persons, or objects; and means a sound disposing mind; that is, the power of understanding the nature of the property and the family, and the effect of the will. Undue influence must not be such as arises from the influence of gratitude, affection, or esteem; but it must be the control of another will over that of the testator, whose faculties have been so impaired, as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed * to the power of the controlling will.[64] In another case,[65] where the testator was in extreme old age, and in the last stage of bodily infirmity, bedridden, utterly helpless, and dependent on the care of the plaintiff, sole devisee of the realty, and a nurse, the only legatee, and a physician, one of the witnesses, and an intimate friend of the devisee; her own attorney, another witness having prepared the will, on instructions elicted by himself from the testator, by interrogatories; and where they had, a few days before, represented him "as quite incapable of managing his own affairs, or taking care of his person;" and it being admitted, that two or three days before, he was not competent to make the will; yet the jury being told, that if he understood the state of his property and of his family, and the effect of his will, and he had free volition, and the will was really in accordance with his intentions, it was valid; and there being evidence that it was so made, a verdict in favor of the will was not disturbed.[66]

[64] 1 Foster & Finlayson, 578; Lovett *v.* Lovett, id. 581.

[65] Swinfen *v.* Swinfen, 1 F. & F. 584.

[66] This seems precisely one of those cases, where a jury will be likely to give a verdict, in accordance with their sense of the propriety of allowing the will to stand. And this depends, very much, upon whether it conforms to the known or presumed intention of the testator, while in condition fully to comprehend the nature of the transaction.

48. It is not competent for the person drawing a will, to testify what passed between him and the testator at the time, for the purpose of showing, that a will, giving legacies, generally, and devising the residuum of the testatrix's real estate to her children, she having only real estate at the time of the execution of her will, but becoming possessed of personalty before her decease, was intended to operate only upon such estate as she had at the date of the will.[67] This, in the language of *Ellsworth*, J., "is attempting to deny, and control the will, by parol * proof, rather than to explain away any ambiguity, created by extraneous circumstances applied to it."

49. It seems to be an universal rule in America, in regard to the admission of parol evidence to explain written instruments, and especially in regard to wills, that such testimony, showing the condition of the subject-matter upon which the writing is to operate, as the state of the testator's property, is always admissible to explain a latent ambiguity,[68] or to aid the construction, whether the ambiguity be latent or patent. But a patent ambiguity cannot be explained, by direct extrinsic evidence of testator's intention.[68]

50. But the testimony of the scrivener is never admissible to explain the meaning of ambiguous terms used in a will, except in the case of a latent ambiguity.[69]

[67] Canfield *v.* Bostwick, 21 Conn. 550. It is here held, that the question of the operation of the will, upon the testator's property, and the time from which it shall be regarded as speaking, is an intendment of law, and not liable to be controlled by direct proof of the testatrix's intention.

* [68] Brainerd *v.* Cowdrey, 16 Conn. 1; Ward *v.* Epsy, 6 Humph. 447; Doe *v.* Roe, 1 Wend. 541; Tudor *v.* Terrel, 2 Dana, 47; Davis *v.* Davis, 3 Am. Law Reg. 533; Holton *v.* White, 3 Zab. 330; Riggs *v.* Myers, 20 Mo. 239; Domestic & Foreign Mission Society *v.* Reynold, 9 Md. 341; Mitchell *v.* Mitchell's Lessee, 6 Md. 224; Brownfield *v.* Brownfield, 20 Penn. St. 55; Douglas *v.* Blackford, 7 Md. 8; Johnson *v.* Johnson, 32 Ala. 637.

[69] M'Allister *v.* Tate, 11 Rich. Law, 509. But the testimony of the scrivener has been received, in a considerable number of American cases, and in many of the earlier English cases, with a view to aid the court in the constructon of the will, under circumstances not altogether reconcilable with the settled rules of law upon the subject. Thus in Nolan *v.* Bolton, 25 Ga. 352, the attorney who drew the will was allowed to testify to his instructions, and the declarations of the testator, at the time of executing the will, that apparent loans should be treated as advancements, this being considered part of the res gestæ, and that the testimony tended to show, in which of two admissible senses, the words of the will were used.

51. The American cases, as well as the English, allow a very extensive range of testimony in support of, and in reply to, evidence tending to show undue influence and weakness of mind, as * the moving and proximate causes of the will. Thus, another will executed eight years before, making a different disposition of the testator's property, was received, as tending to support the claim of undue influence.[70] And on the other hand, evidence of harshness, abuse, and menace, on the part of the beneficiary, and timidity on the part of the testator, will induce the court not to disturb a verdict against the will.[71] And evidence tending to show the previous purposes of the testator, in regard to the disposition of his property, is receivable, upon the question of the capacity to comprehend the will, and how far it was the result of free will.[72] And unpublished wills are admissible upon this question.[73] But in many well-considered cases, declarations of the testator, tending to show his wishes, in regard to the disposition of his property, made for periods more or less remote from the time of the execution of the will, have been rejected.[74]

52. The execution of an instrument as a will, by the testator, with the requisite solemnities, is presumptive evidence that he knew its contents, and that it conforms to his intentions; and it is incumbent on those who seek to avoid it on the ground that it makes a disposition of his estate of which he at the time was not fully apprised, or had no knowledge, to establish the fact aliunde: and, as we have elsewhere said, the capacity of the testator, although disproved by

So the declarations of the testator, at the time of executing his will, have been received to show, that he had provided for certain of his children, which were omitted in his will, and that their names were purposely omitted, and not by accident. Lorieux *v.* Keller, 5 Clarke, 196. But in the late case of Jones Executor *v.* Jones, 2 Beasley, 236, it was held that parol evidence is inadmissible to show on behalf a purchaser of "one-third" of a lot under a will, that the scrivener by mistake inserted "one-third" instead of "two-thirds" as directed.

[70] Hughes *v.* Hughes, 31 Alabama, 519.

[71] McDaniel *v.* Crosby, 19 Arkansas, 533.

[72] Means *v.* Means, 5 Strobh. 167.

[73] Love *v.* Johnston, 12 Iredell, 355.

[74] Landis *v.* Landis, 1 Grant's Cases, 249. The declarations here were made more than two years before the execution of the will. Runkle *v.* Gates, 11 Ind. 95. The question of undue influence is extensively discussed by *Hanna*, J., in a later case in this state, Noble *v.* Enos, 19 Ind. 72, where the will of a married woman came in question.

the subscribing witnesses, may be established by other sufficient evidence.[75]

53. But gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will, or otherwise, may change the burden, and require explanation on the part of those who support the will, to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind.[76] In the last case it was held, that lawful influence, such as arises from legitimate or social relations, must be allowed to produce its natural results even upon last wills; and the fact of the existence and operation of such influence upon the mind of the testator is no ground for declaring it unlawful. Nor is a will to be condemned on account of inequalities in testamentary dispositions produced by such influence. It is only when the influence is exerted over the very act of devising, — so as to prevent the will from being truly the act of the testator, — that the law condemns it as a vicious element of the testamentary act.[76]

54. And in a recent case in Vermont,[77] very remote circumstances tending to show the improbability of the testatrix having acted understandingly, and free from extraneous influence, in making her will, were allowed to be adduced; as that she had brothers and sisters in necessitous circumstances, for whom she cherished feelings of affection, but for whom she made no provisions in her will, the principal legatee being her brother, and of intemperate habits. And it was also here allowed to be proved, that, for four years before the execution of the will, the testatrix, during a great portion of every year, appeared strange and unnatural in her conduct, habits, and conversation, and different from what she was before that period.

55. But in a very recent case in Michigan,[78] a wider range of inquiry was indulged by the court than in almost any other upon record. It was there held, that a will being assailed for fraud and undue influence on the part of the wife, statements of the testator that he regretted his marriage, that he was not master at home,

[75] Sechrest *v.* Edwards, 4 Met. (Ky.) R. 163.

[76] Harrel *v.* Harrel, 1 Duvall (Ky.) R. 203.

[77] Fairchild *v.* Bascomb, 35 Vt. R. 398. And a very wide range of proof and of examination of witnesses was allowed in Beaubien *v.* Cicotte, 12 Mich. 459.

[78] Beaubien *v.* Cicotte, 12 Mich. 459.

that he was afraid of his wife, and was compelled to submit to her demand, or otherwise there would be trouble in the house, are admissible evidence. This will having disinherited the testator's relatives in favor of his wife and her relatives, it was held competent to prove the wife's abuse of the husband's relatives, and her quarrel with him about a former will by which he had made provision for them. A wide range of inquiry into the family relations and the terms upon which they lived is allowable in these cases. Evidence that the testator made no complaint of any importunities on the part of his relatives is also admissible in such case, where it appeared that the wife had made charges to him of their rapacity. Evidence of former wills and of other pecuniary arrangments for the wife is also admissible, as having a bearing upon the question whether the testator has understandingly and of his own free will changed his settled views.

SECTION III.

ADMISSIBILITY OF TESTATOR'S DECLARATIONS.

1. Not admissible as those of a party.
2. Not admissible to affect the construction of the will.
3. Admissible to show *intention* in giving a legacy.
4. To show whether will was published by the testator.
5. So, also, as to an equivocal act of revocation, as part of the res gestæ.
* 6. Admissible upon questions of fraud and undue influence.
   a. But not to established facts, dependent upon the veracity of the testator.
   b. Abstract of the rule declared by different judges.
   c. Statement of the only English case relied upon, for their general admission.
   d. The weight of American authority is against their admission in proof of *facts*.
   e. Admissible to show the state of the testator's mind.
   f. Not admissible to prove fact of importunity and undue influence.
   g. Extent to which they are admissible as to condition of testator's mind.
   h. They afford great aid, in determining the effect produced on the testator's mind.
   i. If made before the testamentary act, will be of more force than if made after.
   k. Not connected with the subject of will, admissible to test mental capacity, even where made long before its execution.
   l. Declarations to show comprehension of the subject, and absence of surprise.
   m. Sometimes received for exceptional purposes.
   n. Statement of the general results.

o. Conclusion to which the New York Court of Appeals arrived in a late case.
p. Not admissible to show revocation.
q. How far admissible to show fraud, or influence.
r. Distinction between the *acts*, and *effects*, constituting undue influence.
s. Statement of an important case in New Jersey.
t. The practice, in the ecclesiastical courts, to receive declarations.
n. 40. Exposition of the ground upon which the admissibility goes.
n. 44. Practice of the ecclesiastical courts stated.

7. In cases of latent ambiguity, such declarations always receivable.
8. And it makes no difference whether made before or after, or at the time of the execution.
9. Further exposition of the reason of the rule in cases of latent ambiguity.
10. Discussion of the authorities bearing upon this question.
11. If the words or circumstances indicate how the terms were used, no latent ambiguity arises.
12. The present state of the law upon this question.
13. Extrinsic evidence not receivable, except in cases of strict equivocation.
14. Declarations of testator admissible to show knowledge, and to rebut fraud.
15. Declarations of blind testators receivable, to show knowledge of provisions of will.
16. So, also, to rebut charge of surprise or incapacity, by proving former purpose.
17. But not to show imposition upon testator, in state of intoxication.
18. The American cases adhere strictly to the rule, excluding parol evidence, to show intent.
19. In some of the states, courts of equity have corrected mistakes in wills.
* 20. Mere mistakes in a will, where no fraud is imputable, not corrected in equity.
21. Courts of equity will lend aid in cases of fraud, if required.

§ 39. 1. The inquiry, how far the declarations of the testator are admissible, to affect the validity, operation, or construction of a will, or, for what purposes such declarations are admissible, in the trial of testamentary causes, is one of considerable practical importance, since such declarations are very likely to be pressed upon the consideration of the courts, in the trial of such causes, and are often regarded by the jury, before whom questions of testamentary capacity, fraud, and undue influence, in the procurement of wills, are very likely to occur, as of paramount weight. It is certain such testimony is not admissible for the purpose of proving any distinct fact, depending upon the force of the admission, since the testator is not a party to the question of the validity, or interpretation of his will.[1]

*[1] Comstock *v.* Hadlyme, 8 Conn. 254. There are some cases, where the declarations of the testator, or devisor, are sought to be treated as evidence, in trials, respecting the title of land devised, upon a controversy between the devisee and the heir, but they have not been admitted even there. Jackson *v* Kniffen,

2. Nor can such declarations, whether made before, contemporaneously with, or subsequent to, the making of the will, be received, to affect its construction. This has been repeatedly decided in the American courts.[2] The declarations of the testator after making his will, of his purpose and intention therein, * are not admissible in evidence, to control or explain it.[3] This exclusion rests upon the general principle declared in all the reports, from Cheney's case,[4] to the present day, that no parol evidence can be received to contradict, explain, supply, enlarge, or qualify the words of a will, nor to explain the intention of the testator, except in the instances of a latent ambiguity, arising dehors the instrument, either as to the subject or the object of a bequest; and to rebut a resulting trust.[5]

3. But there are many well-defined exceptions to the rule rejecting the declarations of the testator, in testamentary causes. There is, in chancery, a recognized rule, that where the testator gives his creditor a legacy, equal to, or larger than the debt, and of the same quality as the debt, that being due, it is prima facie in discharge of the debt. The rule has not been looked upon with much favor, and all conceivable exceptions to it have been allowed, and the declarations of the testator, in regard to his intentions, have been received, to rebut the presumption.[6] And * it is obvious,

2 Johns. 31. But as most, if not all, the American states, now require, that wills of real estate as well as personal shall be first established in the probate court, the question of testamentary capacity can only arise there, and upon appeal from the probate of the will, where that question is determined, in the abstract, so to speak, in which all claimants under the will are more or less interested. But the declarations of the testator are admissible to show the place of his domicil, the same as those of any other one whose place of domicil comes in question. For this purpose, not only the testator's declarations upon the point, but the designation of his residence in his will, have been held admissible to determine the place of domicil at or about that time. Wilson *v.* Terry, 9 Allen, 214.

[2] Farrar *v.* Ayres, 5 Pick. 404; Barrett *v.* Wright, 13 Pick. 45; Tucker *v.* Seaman's Aid Society, 7 Met. 188; Osborne *v.* Varney, 7 id. 301; Bradley *v.* Bradley, 24 Mo. (Jones), 311; Avery *v.* Chapel, 6 Conn. 270. This principle is of such universal application, and lies so much at the foundation of all rights of property, depending upon written evidence, that it scarcely seems requisite to multiply cases here. Brown *v.* Saltonstall, 3 Met. 423.

[3] Weston *v.* Foster, 7 Met. 297.

[4] 5 Co. Rep. 68.

[5] Avery *v.* Chapel, 6 Conn. 270, 274; ante, § 37; Massaker *v.* Massaker, 2 Beasley, 264.

[6] In Fowler *v.* Fowler, 3 P. Wms. 353, 354, Lord *Talbot* said: "Though in some

that in every case, where it is competent to show the *intention* of the testator, as to giving a legacy, it must be done by proving his declarations. Hence, upon questions of debts or portions being adeemed, by legacies of equal or greater amount; and also, whether debts due the testator are intended to be released, by a legacy to the debtor, and in all other cases, where the *intention* of the testator is allowed to be inquired into, his declarations must

cases parol evidence had been allowed, in order to show that the testator designed to give such legacy, exclusive of the debt" (the general rule at that time being, if equal to, it was presumed to be in payment of the debt); "Yet his lordship said his opinion was, not to admit such evidence; *for then the witnesses, and not the testator, would make the will.*" And in the early and important case of Fry *v.* Porter, 1 Mod. Rep. 300, 310, in the Exchequer Chamber, Lord *Hale* said, upon this subject: "*A will* will be any thing, every thing, nothing. The statute appointed the will should be in writing to make a certainty, and shall we admit collateral averments and proof, and make it utterly uncertain." It is doubted, in Eaton *v.* Benton, 2 Hill, N. Y. 576, whether the declarations of the testator, at or about the time of making his will, could be *received in evidence*, for the purpose of showing that a bequest, prima facie gratuitous, was intended by the testator to be in satisfaction of a debt due from him. *Bronson*, J., here says: "It is said to be a general rule, that a legacy given by a debtor to his creditor, which is equal to, or greater than the debt, shall be considered a satisfaction of it. Within this rule, if the debt be a hundred dollars, and the legacy be also a hundred, the debt is paid, and the legatee has got nothing by the gift. But if the debt be a hundred, and the legacy ninety-nine, no part of the debt is satisfied, and both debt and legacy must be paid by the executor. These consequences follow from the general doctrine, as it has usually been laid down. But the doctrine has been subjected to the influence of so many qualifying circumstances, that it was remarked, by *Savage* Ch. J., in Williams *v.* Crary, 4 Wend. 443, 'that the rule on this subject seems to be, that a legacy shall *not* be deemed a satisfaction of a preëxisting debt, unless it appears to have been the intention of the testator that it should so operate.' . . . It will be seen, upon looking into the books (Toller on Exrs. 336–338, ed. of 1834; Math. on Presump. Ev. 107–118; Chancey's case, 1 P. Wms. 409, note 1, by Cox), that the courts have never been quite satisfied with the doctrine; and they have been ready to seize, upon slight circumstances, for the purpose of repelling the presumption — if, indeed, there be any — that the legacy was intended as a satisfaction of the debt. Parol declarations by the testator have been admitted; and where the less questionable course has been pursued, of looking at the will for the purpose of ascertaining the intention of the testator, it has been thought, that the presumption of satisfaction was sufficiently answered, by an express direction in the will for the payment of debts; or that the legacy is given upon a contingency; or is, in some one particular, less beneficial than the debt, though more so, in other respects, as where the legacy, though greater in amount than the debt, is not to be paid until a future day."

be received.[7] We shall examine this subject more at length in another place.[8]

* 4. The declarations of the testator, made contemporaneously with the execution of the instrument, are always admissible as part of the res gestæ, to determine whether the paper were published as the last will of the party executing it. This question occurred, more commonly, in England, under the former statutes, where wills of personalty were not required to be in writing, and where, by consequence, it was very common, that testamentary acts, in regard to personalty, were presented before the ecclesiastical courts, in very various forms, and many papers, not assuming upon their face to be testamentary, were admitted to probate. Hence the Prerogative Court of Canterbury has, in repeated instances, granted probate of the assignment of a bond ;[9] receipts for stock, and bills indorsed " for A. B." ;[10] of a letter ;[11] marriage articles ;[12] and promissory notes, and notes payable by executors, in order to avoid legacy duty.[13] So of bonds prepared in substitution of legacies, in a revoked will, but the obligor having been prevented from executing the bonds by his death.[14] So also of a deed or other instrument of conveyance, executed to take effect at the death of the grantor.[15] In all this class of cases, the

[7] 2 Story, Eq. Jur. § 1119–1123, and cases there cited. See also, Chancey's Case, 1 P. Wms. 408 ; 2 Eq. Cas. Abr. 354, pl. 18 ; and notes Eng. & Am. in 2 Lead. Cas. in Eq. 318. And it seems clearly settled, that, where the declarations of the testator are receivable to show his intention in his will, they are receivable, not only when made, at the time of the act, and as part of the res gestæ, but such as were made at any period before or after the act. Lord *Eldon*, in Trimmer *v.* Bayne, 7 Vesey, 508, 518, said : " A declaration, at the time of making the will, is of more consequence than one afterwards, and a declaration after the will, as to what he had done, is entitled to more credit than one before the will, as to what he intended to do ; for that intention may very well be altered, but he knows what he has done, and is much more likely to speak correctly as to that, than as to what he proposes to do, though these parol declarations are all alike admissible."

[8] Post pt. 2, § 52.

[9] Musgrave *v.* Down, cited in 2 Hag. 247.

[10] Sabine *v.* Goate, in id. 247.

[11] Drybutter *v.* Hodges, in id. 247.

[12] Passmore *v.* Passmore, 1 Phillim. 218 ; In re Knight, 2 Hagg. 554.

[13] Maxee *v.* Shute, in 2 Hagg. 247.

[14] Masterman *v.* Maberly, 2 Hagg. 235.

[15] In re Knight, 2 Hagg. 554 ; Shingler *v.* Pemberton, 4 Hagg. 356.

ecclesiastical courts admit evidence of the declarations of the testator, that he intended the paper * to operate as testamentary.[16] But these cases are not of much interest anywhere now, except for the analogies which they present, since, by the recent statutes, both in England and this country, such wills are not recognized; and the rule had become considerably narrowed, even in England, by the more recent case of Thompson *v.* Browne,[17] where it is declared, that an instrument, vesting property in trustees, for the benefit of the grantor, for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary.[18]

5. The declarations of the testator are receivable, to determine his intention in regard to the revocation of a former will, when made contemporaneously with some act of revocation named in the statute, and which is equivocal in its character, such as tearing, or slightly burning.[19]

6. There can be no question, that where the contestants of the validity of the will attemp to show fraud, or undue influence in procuring it, the testator's declarations are competent evidence for some purposes. The great difficulty seems to lie, in determining the extent to which they will be allowed to operate, as distinct and independent evidence of the facts embraced in such declarations.

a. The proof of the due execution of a will being made, and * general evidence of the requisite testamentary capacity being given, if required, any attempt to show fraud or undue influence in the procurement of the will, must necessarily come from those who oppose the admission of the will to probate. For this purpose,

* [16] King's Proctor *v.* Daines, 3 Hagg. 218.

[17] 3 Myl. & Keen, 32.

[18] Attorney-General *v.* Jones, 3 Price, 368, is here limited to the circumstances of that particular case. Even where a person gave instructions for a will of personalty, under the former English statute, and died before the instrument could be formally executed, the instructions, though not reduced to writing in his presence, or even read over to him, would have operated fully as a will. Carey *v.* Askew, 2 Bro. C. C. 58; s. c. 1 Cox, 241; 1 Wms. Exrs. 63, and numerous cases there cited. The cases upon this question are curious, as showing the desire of the courts to uphold even the most imperfect testamentary acts, but will not be proper to be here repeated, since they are of no present force, and have been before alluded to; ante, § 17, pl. 10, and n. 12.

[19] Doe d. *v.* Perkes, 3 B. & Ald. 489; Doe d. *v.* Harris, 6 Ad. & Ellis, 209, 215.

the declarations of the testator, made subsequent to the execution of the will, to the effect that he had been misled, and seduced into the execution of the instrument, or any other declaration made by him, tending to establish the existence of fraud, or undue influence, in the procurement of the will, where the force of the evidence depended upon the veracity of the testator, in making such declarations, are, we think, not properly admissible. Such declarations are, in that view, mere hearsay evidence, and to be tested by the same rules as other hearsay evidence.[20]

b. The rule is thus declared by *Washington*, J.:[21] "The declarations of a party to a deed or will, whether previous or subsequent to its execution, are nothing more than hearsay evidence, and nothing could be more dangerous than the admission of it, to control the construction of the instrument, *or to support or destroy its validity*." *Thompson*, J.:[22] "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached, by the parol declarations of the testator himself, would, in my judgment, be eluding the statute, and an infringement upon well-settled and established principles of law.[23] . . . To permit wills to be defeated, or in any manner whatsoever impeached, by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed." Mr. Justice *Story* held, that declarations made before, and at the time of the execution of the will, might be admitted, for some purposes, as * part of the res gestæ, but not, if made so long after its execution, as not to form part of the transaction.[24]

c. The only English case much relied upon, in favor of such ad-

[20] Comstock *v.* Hadlyme, 8 Conn. 254.

[21] Stevens *v.* Vancleve, 4 Wash. C. C. 265.

[22] Jackson *v.* Kniffen, 2 Johns. 31. But in a very recent and well-considered case, Colvin *v.* Warford, 20 Md. 357, it was decided that the declaration of the testatrix, when apparently in a sane state of mind, that, when she executed her will, she was crazy, is competent to be weighed by the jury in connection with other evidence tending to show such to have been the fact. But we should hesitate to adopt that view. No doubt, declarations of the testator are always admissible to show the state of mind at the time, but not at a prior time so remote as to have no connection, as cause and effect. A declaration whose force depends upon its credit for truth is always mere hearsay if not upon oath.

[23] 1 Vesey, 440; 5 Co. 69; 1 P. Wms. 136.

[24] Smith *v.* Fenner, 1 Gallison, 172; Provis *v.* Rowe, 5 Bing. 435.

mission of the declarations of the testator, is in Vernon,[25] decided as early as 1688, and where the court declined to interfere, on the ground, that the party having obtained the probate of the will in the spiritual courts, courts of equity would not interpose to set it aside, so far as personalty is concerned. But if any one, claiming under the will, comes into a court of equity for aid, it was said he shall not have it. In this case, which is very briefly and imperfectly reported, it seems, that testimony of the declarations of the testatrix, in her last sickness, were admitted, in which she "complained how she had been circumvented by the plaintiff, and of the injury she [the testatrix] had done to her mother and sisters, by giving her estate from them. She heartily repented that she was thus fettered; but durst not, for fear of damnation, revoke or alter her will, and shortly afterward died, much troubled and afflicted, that she could not alter her will." It appeared, the plaintiff had extorted an oath from her, that she would make the will, and not revoke it. The case does not seem to have been argued, or if so, it does not appear that any exception was taken to the admission of the testimony. As the court do not seem to have acted, mainly, upon it, the case could scarcely be regarded as of much weight in favor of such a proposition. And it is certain, we think, the case is opposed to principle, and to the general current of the decisions since.[26]

* d. And although some of the American cases[26] incline to hold, that the declarations of the testator are admissible to prove the fact of fraud, or undue influence having been exercised in the procurement of the will, we think the rule of law is clearly against the admission of any such testimony, for that purpose. The point has

[25] Nelson *v.* Oldfield, 2 Vernon, 76.

[26] There are some American cases, which have adopted views similar to those maintained in Nelson *v.* Oldfield, supra. In Roberts *v.* Trawick, 17 Ala. 55, it seems, that declarations of the testator, made many years before the execution of the will, tending to show a fixed and settled purpose to make a will, similar to the one in question, were held admissible to rebut the claim, that it was procured fraudulently, or by the over-persuasion of others. This, as we have before said, is defensible upon special grounds. And declarations made by the testator, within a few weeks of the time of the execution of the will, have been admitted, with a view to prove the fact, that the will was procured by fraud, or undue influence. Roberts *v.* Trawick, supra; Means *v.* Means, 5 Strobh. 167. See also, Cawthorn *v.* Haynes, 24 Mo. (3 Jones), 236; ante, § 38, pl. 39, where the proper limitations upon this question are attempted to be defined. The declarations of the testator are admissible, whenever it becomes important to learn the state of his mind, or his intentions, at the time of making such declarations.

been so ruled in a considerable number of well-considered cases, and the principles of evidence are so clearly in favor of the rejection of the testator's naked declarations, upon that point, that we cannot believe any such rule will be permanently acted upon.[27]

e. In the case last named, it was claimed, that the testatrix had been unduly influenced in making her will, and that her declarations, made about the time of executing the instrument, were admissible for the purpose of proving that fact. But the court held, that although such declarations were clearly admissible, to show her capacity, and the state of her mind, about the time of the execution of the instrument, that they could not be received to prove the facts, urged against the validity of the will. And the same view is taken, by the same court, in a later case.[28]

* f. The subject was very carefully examined by *Isham*, J., in a case,[29] which more than once came before the Supreme Court, in Vermont. The learned judge there said: "In relation to the admissibility of her [the testatrix's] declarations, to prove the fact that such importunity and influence were exerted, we must consider the matter, as settled by a former decision of this court, in this case, in which her declarations were held inadmissible for that purpose. That decision is evidently sustained by the authorities." [30]

g. But it was here decided, that the declarations of the testator were admissible, for the purpose of showing the state of her mind, at the time of the execution of the instrument; that it was in that enfeebled state, in which it was incapable of resisting the importu-

[27] Comstock *v.* Hadlyme, 8 Conn. 254; ante, § 38, pl. 39.

[28] Kinne *v.* Kinne, 9 Conn. 102. This rule is sustained in Pennsylvania. McTaggart *v.* Thompson, 14 Penn. St. 159; Rambler *v.* Tryon, 7 S. & R. 94; Chess *v.* Chess, 1 Penn, 32; Irish *v.* Smith, 8 S. & R. 573; Moritz *v* Brough, 16 S. & R. 403. In the case of Reel *v.* Reel, 1 Hawks, 248, 268, 269, the subject is examined in detail, and the declarations of the testator are there held admissible to defeat the will. So also, in the more recent case of Howell *v.* Barden. 3 Dev. 442.

[29] Robinson *v.* Hutchinson, Ex'r, 26 Vt. 38.

[30] Provis *v.* Reed, 5 Bing. 435. *Best*, Ch. J., here said: "It has been insisted that declarations of the testator were admissible in evidence, to show that the will he had executed was not valid; but no case has been cited, in support of such a position, and we shall not, for the first time, establish a doctrine, which would render useless the precaution of making a will; for if such evidence were admitted, some witness would constantly be brought forward, to set aside the most solemn instrument." S. P. Richardson *v.* Richardson, 35 Vt. R. 238; Fairchild *v.* Bascomb, id. 398.

nity and influence, which it was claimed was exerted upon her. The object of this testimony is to show such a state of weakness, or vacillation of mind, as rendered the testator an easy victim, either of artifice, force, or fraud. Such declarations afford the most satisfactory evidence, not only of the strength of mind, but often exhibit those peculiar phases of the mind, and of the affections, which especially expose the testator to be overcome by the terror of threats, or the seductions of flattery. And although these declarations will necessarily afford some ground for judging, in regard to the effect of any attempts at undue influence, that element in the testimony not * being legitimate, can only be eliminated by the judge, in summing up to the jury.

h. The declarations of the testator, by presenting the precise state of his mind, will often afford great aid in determining the fact, how far attempts at fraud or undue influence, may, or may not, have had their desired effect upon the testator's mind, and how far the will is the offspring of such attempts, on the one hand, or of the free and voluntary action of the testator, upon the other. Hence, while the declarations of the testator are of but slight account, in establishing the independent facts, constituting fraud or undue influence, and, on that account, have more commonly been rejected, in the courts of equity, and of common law, as not competent to be received, for that purpose, they will often be found of paramount importance, in reply to such a charge, where it is not founded in fact. We should always expect, that if the testator was of sound, disposing mind, and acted without constraint in the testamentary act, that any amount of truthful evidence, tending to show the contrary, might readily be overcome, in the mind of a jury, by showing the conversations of the testator, from day to day, and time to time, for the few days, or months, preceding the execution of the will; and also, subsequent to that date, whenever he recurred to the subject. In the case of Robinson *v.* Hutchinson, supra, *Poland*, J., in the trial of the case before the jury, in summing up the reasons for the admission of the declarations of the testator, said: "We do not perceive any serious objection to the admission of this testimony, . . . when the declarations were made, so near the time of the execution of the will, that a reasonable conclusion may be drawn, as to the state of mind of the testatrix at the time the will was executed. Weakness of mind, arising from advanced age, in connection with causes suggested in this

case" [advanced age, disease, and domestic afflictions], "is progressive and permanent in its character. It exists in the mind itself, and therefore it is, that weakness of mind, at the time of making the will, may be inferred from * weakness subsequent, as much so as imbecility of mind, under similar circumstances. And, particularly is the testimony important, in showing the extent and character of the influence, which the person drawing the will had over the mind of the testatrix."

i. It is obvious, that the declarations of the testator, made before the execution of the will, and while the subject was under consideration, will be of more weight than declarations made after the execution of the instrument, in determining whether the testator's mind was in a quiet and unruffled state, and wholly free from the influence of all extraneous agencies, or was in agitation and distress, harassed by fears and apprehensions, and so excited and pained, as scarcely to leave any quiet and free discretion. And declarations made after the execution of the will, unless they proceed from a restless and unsatisfied feeling, as if all had not been properly done, generally come, in reply to inquiries and objections from interested parties. In such cases, these declarations, being made to get rid of inquisitiveness, and to foreclose objections, will be liable to be affected, very much, by the nature of the counter declarations, in reply to which they are made.

k. But declarations made long before the execution of the will, and before the testator had the subject under consideration, may be proved, for the purpose of showing weakness, or unsoundness of mind, of a permanent character, since the existence of such a state of mind being once shown, a very strong presumption arises in favor of its continuance, unless there is very distinct and clear evidence of its having been removed. So also, declarations of the testator, made after the execution of the will, especially if made soon after, may show such a state of fixed imbecility, or perversion of mind, as would not be likely to have occurred, in any short period, unless by some sudden shock, and which may therefore afford some just ground of opinion, in regard to the state of the testator's mind, at the time of the execution of the instrument. It is apparent, that the * declarations of the testator, that he did not execute his will freely, that he never intended to have made such a will, and never should, but for the influence of those persons in whose favor it is made, and similar declarations, which are very common, in the tes-

timony elicited in testamentary causes, can be of no force whatever, as testimony tending to establish the truth of the declarations. In that light, such declarations are mere hearsay, depending for their force upon our confidence in the veracity of the person making them, and in most cases easily explained, without regard to the question of their truth, and which have always been rejected as evidence.[31]

* 1. Declarations of the testator are often received, to the effect

[31] Smith *v.* Fenner, 1 Gallis. 170. But see Den Stevens d. *v.* Vancleve, 4 Wash. C. C. 262, 265, where similar declarations, tending to show a long-settted purpose of disposing of his property in the manner he did in his will, were held incompetent evidence to prove capacity to comprehend the provisions of the will. See also, Dickinson *v.* Barber, 9 Mass. 225, where it is said, that upon a question of insanity at a particular time, evidence may be admitted to prove such insanity existing at the time, and for several months before and after, but no further. And in Grant *v.* Thompson, 4 Conn. 203, the same rule is declared, with less severity of limitation. The truth is, unquestionably, that the court must judge, in each particular case, how far it will be profitable to extend the rule in regard to the admissibility of evidence, before and after the precise date in question. This will depend very much upon the character of the unsoundness of mind attempted to be proved. Drunkenness, or the delirium of a fever, is of so short duration, that the proof, to be of any avail, must come very near the precise time when the act was performed; while the decadence of old age, and many forms of mental derangement and imbecility, are of slow advance, and proof of their distinct development, at any given period, will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty.

In a late case in Connecticut, Denison's Appeal, 29 Conn. 399, where the testator had bequeathed most of his estate to his brother, to the disinheritance of his three sisters, or nearly so, it was held competent to prove the testator's declarations, made a long time before the execution of the will, and before his mind was enfeebled, that none of his property should ever go to the family of his brother; and that the character and provisions of the will were proper subjects for the consideration of the jury, in determining whether the testator was of sound mind when he executed it. *Hinman*, J., said, in substance, that mere length of time, in itself, was no sufficient ground to exclude the testimony, since, if the intervening period had been one of enmity, the length of time would rather serve to increase the improbability of the bequest; whereas, if made ever so near the time of executing the will, if reconciliation took place before the will was made, the declarations would cease to have any effect.

And where the testator had omitted to make provision for certain of his children in his will, it is competent, in order to show that such omission was intentional, to prove, by parol declarations of the testator, made at various times within twenty years before making his will, that he had already made provision for such children, and should give them nothing more; and former wills, in which he made no provision for them, may be given in evidence for the same purpose. Converse *v.* Wales, 4 Allen, 512. See also, Wootton *v* Redd's Exrs. 12 Grattan, 196; Williamson *v.* Nabers, 14 Ga. Rep. 286.

that he intended to give particular persons, named in the will, legacies, sometimes naming the amount; and such declarations, made after the execution of the instrument, as that he had given such legacies to particular persons, are often received, in the trial of testamentary causes, not for the purpose of establishing the fact of such legacies having been given, for that could only be shown by the will itself; but to show that the testator intended to make a disposition of his property similar to that which he did make; that he had had the subject long under consideration, and that he entertained these opinions and feelings at a time when there was no pretence of extraneous influence upon him; or that he understood the nature of the provisions of his will, and felt satisfied with them, after all presence, or effect, of any disturbing influence upon the mind had been entirely removed. But declarations of this character, made after the execution of the will, can be of but slight account, since the majority of men, after having once done an act, under whatever influence, very easily convince themselves that it is right, and feel strong reluctance to change it; and this feeling is more controlling with weak minds, often, than with those of more scope, force, and comprehension; and is very * sure to exist in an individual of originally strong and decided powers of mind, and whose mental faculties have become enfeebled by age, or disease. These rules for the admission of the declarations of the testator, will require to be applied, with some degree of carefulness and circumspection, in regard to their precise legal and logical importance, which can only be nicely determined, by the mind of the judge, in summing up the testimony to the jury, in each particular cause; but which is nevertheless of weight, sufficient, in all cases, to justify their admission.[32]

* [32] This subject is very lucidly discussed in the second volume of Cowen & Hill's Notes to Phill. Ev. 646, 647, 648, 649. The language of Lord *Eldon*, in Pemberton *v.* Pemberton, 13 Vesey, 301, is very just. His lordship said: "Few declarations deserve less credit, than those of men, as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon them to judge of their own claims, must be taken into consideration, with a fair regard to the prima facie import, and the possible intention, connected with all the other circumstances."

In a late case, Neel *v.* Potter, 40 Penn. St. 483, already alluded to, ante, § 38, n. 41, in the trial of a feigned issue upon the validity of a will, where undue influence upon the mind of the testator was alleged, it was held competent for the devisees to give in evidence, declarations of the testator, at intervals, during a period as far back as twenty years before his death, that he intended to "leave his farm in the name of Neel," upon the ground that it tended to rebut the claim of

m. There is a considerably extensive class of cases, where the declarations of the testator have been received in regard to what passed, at the time instructions were given the scrivener, as to drawing up the will, or when the will was executed; with a view, in some cases, to show that the instructions were not followed, or that the testator was misled; or sometimes, to create a nuncupative will, independent of the writing, before the * existence of the late English statutes, when such wills were valid. Many of these cases have very little application under statutes requiring wills of personalty to be in writing;[33] and all of them are either not of much authority now, or else not applicable to existing statutes.

n. We have examined the question of the admissibility of the declarations of the testator, as an independent means of proving fraud and undue influence, with great care and thoroughness, and

undue influence, by showing that the testator had made his will in accordance with a long-cherished purpose, and especially, as the will bestowed the farm among the testator's own blood relations bearing his name. The point was certainly carried great lengths in this case, but perhaps not beyond the just limits of the principle.

* [33] Gainsborough *v.* Gainsborough, 2 Vernon, 252. Here a trust was claimed, and the declarations appear to have been received, partly, at least, upon that ground. Granvill *v.* Beaufort, 2 Vernon, 648. And here the declarations were received to oust an equity, as it is said. And in Bachellor *v.* Searl, 2 Vernon, 736, the evidence of the scrivener was received to show that the testator did not intend to deprive the executor of the residue of the estate by giving him a special legacy. And this was shown by the declarations of the testator, that plaintiffs who claimed as next of kin, "*should have no more, would give no more away.*" The declarations were therefore received to rebut a prima facie presumption of law. Rutland *v.* Rutland, 2 P. Wms. 210, is to the same point. See also, upon same point, Rachfeld *v.* Careless, id. 158; Blinkhorn *v.* Feast, 2 Vesey, 27, 28. In Mathews *v.* Warner, 4 Vesey, 186, a letter to an attorney, containing instructions for drawing a will, were established as a will. It is certain, we think, that the instructions to the scrivener, or the declarations of the testator to the scrivener, at the time of executing the will, cannot be received, for the purpose of fixing the construction, or meaning of the will. That has been too often decided to be regarded an open question. Coffin *v.* Elliott, 9 Rich. Eq. 244; M'Allister *v.* Tate, 11 Rich. Law, 509; Rapalye *v.* Rapalye, 27 Barb. 610. Parol proof inadmissible to correct mistakes of the scrivener. Cesar *v.* Chew, 7 Gill. & J. 127; Gaither *v.* Gaither, 3 Md. Ch. Decis. 158; Harrison *v.* Morton, 2 Swan, 461; — or that he used words the import of which he did not comprehend. Iddings *v.* Iddings, 7 S. & R. 111. An omission of real estate, through the mistake of the scrivener, cannot be supplied. Andress *v.* Weller, 2 Green, Ch. 604, 608, 609. A mistake, or omission, of this kind, might probably be corrected by parol proof, in regard to property which the law allowed to pass under a will not in writing. Ib. Fawcett *v.* Jones, 3 Phillim. 434.

it must be admitted the cases are not a little conflicting, and the question itself more or less perplexing. The declarations of the testator, so near the time of making the will, *as fairly to be regarded as part of the transaction, showing agitation, anxiety, or an unsettled state of the mind, and the absence of that quiet composure, so requisite for the judicious disposition of one's worldly estate, no doubt have some tendency to show an attempt to influence the testator's action, sufficient to justify their admission generally. It would seem, indeed, that such declarations must always be received, upon the settled principles of evidence, as part of the res gestæ.[34] On the other hand, mere naked declarations of the testator, made so remote from the time of execution as not to form part of the res gestæ, to the effect that attempts at fraud or undue influence had been made, or had compelled him to make a will contrary to his real purpose and intent, as we have before said, seem wholly inadmissible, upon any recognized principles of evidence.

o. The subject has been a good deal canvassed of late, in different states, and being one of such paramount importance, we have felt justified in directing the attention of the profession to some of the more recent cases, and in briefly stating the results arrived at. The New-York Court of Appeals had the subject under consideration in a recent case,[35] and reached the following results: That where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence, which involves his mental condition at the time it was executed, his subsequent statements, touching the disposition of his property, and inconsistent with the will, *in connection with other evidence* tending to prove a want of mental capacity, are competent evidence. It would seem, also, that on these issues his declarations, made before the will was executed, are evidence under the same restrictions, and for the same purpose. Such prior or subsequent declarations are competent evidence *on these questions, only, as tending to prove the testator's mental condition when the will was executed.

p. Mr. Justice *Selden* here discusses the cases bearing upon the question of the admissibility of the testator's declarations, quite in detail. The learned judge said, in regard to the admissibility of the declarations of the testator, upon the question of revocation,

[34] Roberts *v.* Trawick, 13 Ala. 68.

[35] Waterman *v.* Whitney, 1 Kernan, 157.

after reviewing the cases,[36] "I consider these cases as establishing the doctrine, that upon a question of revocation, no declarations of the testator are admissible, except such as accompany the act by which the will is revoked, such declarations being received as part of the res gestæ, and for the purpose of showing the intent of of the act."[37]

q. In reviewing the cases upon the point of proving fraud or undue influence, it is here very justly said, that where the issue involves no question of mental capacity, the declarations of the testator are not receivable. But as very few cases of this kind arise, in the courts, where some such question is not involved, such declarations must generally be received, for the purpose of showing the state and condition of the testator's mind, or as part of the res gestæ, although not entitled to have any weight in proving the distinct external facts, either of fraud or undue influence. The review of the cases by the learned judge, delivering the opinion in this case, is very satisfactory, and he concludes, that even the case of Reel *v.* Reel,[38] is not necessarily * in conflict with the view here taken, "although *all* that is said by the court may not be" entirely reconcilable with it.

r. It seems to us that the distinction just intimated, between the *facts* constituting undue influence, and the *effect* upon the mind

[36] Bibb *v.* Thomas, 2 W. Bl. 1043; Doe *v.* Perkes, 3 B. & Ald. 489; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Betts, 6 Cowen, 377; s. c. 6 Wend. 173; Durant *v.* Ashmon, 2 Rich. 184. This last case, said the learned judge, "is the only direct decision to the contrary" [of the view maintained], and "is in conflict with authority as well as principle."

[37] The same rule here declared must equally apply to the act of making a will, since both the making and the revocation of a will are required by statute to be done in writing, with certain prescribed forms, and the declarations of the testator, in connection with the act, tend to characterize it, and thus form part of it, but those made, either before or after the act, neither tend to characterize, or form part of it.

[38] 1 Hawks, 248. In the case of Hester *v.* Hester, 4 Dev. 228, it was * held, that declarations of the testator, made after the execution of the will, were admissible to prove that it was obtained by fraud. And see also, to the same effect, Howell *v.* Barden, 3 Dev. 442. And the declarations of the testator, on the trial of the question of his capacity to make a will, to the point of the importunity of his wife and father-in-law to procure the will, were held admissible in Rambler *v.* Tryon, 7 S. & R. 90. But these cases are not maintainable, probably, upon the precise ground thus stated. The evidence may, possibly, have been properly received, upon the question of the state of the testator's mind, at the time of making them.

of the testator, the former of which cannot, but the latter may be, proved, by the declarations of the testator, being what concerns the state of his mind, at the date of the testamentary act, will go far to reconcile all the cases upon the subject. For in what is said, in many of the cases, to the effect that the declarations of the testator may be proved to establish mental incapacity, but not to prove undue influence, the writers do not seem to us, always, sufficiently to have discriminated, between the different elements going to create undue influence. This compound result, when carefully analyzed, will be found to consist, partly of extraneous acts, and partly of the effects produced upon the mind of the testator by such acts. Both are equally indispensable to be established by competent evidence. The former can only be proved by evidence, independent of the testator's declarations; the latter are incapable of any satisfactory proof, except by means of such declarations.[39]

* s. The late case of Boylan *v.* Meeker,[40] is one of considerable interest upon this point. The cases are more thoroughly reviewed there, than in any other place which has fallen under our notice. The points decided are thus stated: The conduct and declarations of the testator, both before and after he executed the will, are competent evidence to show his want of capacity, at the time the will was executed, where the issue is upon the sanity of the testator; but after the will is made, such conduct and declarations, manifesting ignorance of the existence of the will,[41] are not competent

[39] In Waterman *v.* Whitney, 1 Kernan, 165, it is said, "The difference is certainly very obvious between receiving the declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter, it is the most direct and appropriate species of evidence. Questions of mental competency, and of undue influence, belong, in this respect, to the same class, because, as is said by Jarman, in his work on Wills, "the amount of undue influence which will be sufficient to invalidate a will, must, of course, vary with the strength or weakness of the mind of the testator." 1 Jarman, 36. "So the mental strength and condition of the testator is directly in issue, in every case of alleged undue influence, and the same evidence is admissible, in every such case, as in cases where insanity or absolute incompetency is alleged."

[40] 4 Dutcher, 274.

[41] We think that in the trial of questions of mental capacity, the declarations of the testator, wherein he attempts to rehearse the provisions of his will, are of considerable importance, and that they have generally been received. For if the

to show that the testator had * never made the will in question. And where the execution of a will is proved in the mode required

testator manifests sufficient capacity and comprehension to rehearse the provisions of the will, especially where they are, to any considerable extent, complicated or extensive, it will afford one of the most satisfactory tests of testamentary capacity. And, on the other hand, if he fails to rehearse them correctly, having no apparent motive for disguise, or simulation, it will afford evidence, more or less satisfactory, according to circumstances, that he either did not know the provisions of his will, at the time of its execution, or else had not sufficient mental power, and active memory, to retain and rehearse them.

In this view, while it is not clear that the naked declarations of the testator can be received, to substantiate a charge of fraud, or to show external acts of undue influence, or attempts to influence the testator, to make a will in a particular direction, it must be admitted, that the testator's declarations, showing his knowledge and full comprehension of all the facts upon which a charge of fraud, or undue influence, is founded, will, of necessity, go far to show, that such attempts at fraud, or undue influence, have failed to produce the desired result, in imposing upon the mind a false view of facts, or relations, whereby * the testator was sought to be misled. In this view, and for the purpose of showing the effects produced upon the mind of the testator, it seems questionable to us, whether his declarations are not admissible as well, where the issue is upon an allegation of fraud, as where it is confined to undue influence. It seems to us, that the effect of both fraud and undue influence, in rendering void the testamentary act, consists in its imposition of a false show upon the mind of the testator. This result will depend, not only upon the activity, power, and soundness of the mind, but upon its being awake to the approach of sinister influences, on the one hand; or upon its being cajoled and seduced into lethargic confidence and false security, on the other. And for the purpose of determining the state of mind of the testator, and how far its equanimity, or its equipoise, has been disturbed, by any attempts at fraud, or undue influence, the declarations of the testator will often be of essential aid to the triers. And the argument, most commonly urged against the reception of this class of evidence, upon the issue of fraud, in testamentary causes, that it will mislead the jury, is one which can never be safely admitted, for it rests upon no satisfactory basis. It is every day's practice, to receive evidence, in jury trials, which is competent for one purpose, but not for others, in regard to which it might have a very natural tendency to bias the jury. That is especially the case, in regard to the declarations of witnesses, when offered to contradict their testimony already given, for the purpose of lessening the weight of this testimony, and which almost necessarily tends to sway the mind of the jury, in the opposite direction, when made near the time of the transaction, and before the witness had conceived the purpose of deception, and still the testimony must be received, for the sole purpose of discrediting the witness. And there is no testimony, received in jury trials, which is not susceptible of misleading the jury. The idea, that juries are any more likely to be misled than any other tribunal, to whom the trial of facts is committed, is the result, in our judgment, of an unjust prejudice, resulting from an ancient rule of the courts, that incompetent evidence might safely go to the court,

by law, the declarations of the testator, made before or after the execution of the instrument, are not competent to prove fraud, duress, or forgery, or to disprove the execution, they are hearsay, merely; but such declarations, made at the time the instrument was executed, are * admissible as part of the res gestæ. The rule upon these points is the same in the case of wills, that it is in the case of deeds.

t. These propositions are here elaborated by two of the judges, in opinions of great length, reviewing the cases from the earliest times to the present, which will be found to contain much valuable commentary upon the principles involved. It seems to be here confessed, that the practice of the ecclesiastical courts is in conflict with the decision here made, in regard to admitting the declarations of the testator to contradict the will, and that in those courts such declarations are constantly received, upon the issue of fraud, and undue influence, to establish the leading facts upon which the charge is founded, of which there can be no question.[42] Declarations of the testator are there received, not to revoke the will, but to explain the intention of the testator.[43] And in a case in equity,[44] it is said, arguendo, by Sir *Edward Sugden*, that the ecclesiastical courts, following the practice of the Civil Law, would admit evidence of every kind, including that furnished by the instructions and declarations of the testator at the time the will was prepared and executed, to assist them in determining, whether one will, or bequest, was, or was not, intended to supersede another.[45] * Decla-

but not to the jury, of which some traces exist in the old books of reports, and which has been received in modern practice without much scrutiny, but which has no foundation, either in fact or principle.

[42] Saff *v.* Atkinson, 2 Eng. Eccl. Rep. 67. But as these courts do not proceed with much formality, and have never had jurisdiction in the probate of wills affecting real estate, no very great reliance is to be placed upon their course of procedure, as tending to control the course of such trials, in the common-law courts, or in probate appeals in testamentary causes. Ross *v.* Ewer, 3 Atk. 163; *Tindal*, Ch. J., in Marston *v.* Fox, 8 Ad. & Ellis, 14, in Exchequer Chamber.

[43] Johnson *v.* Johnson, 1 Phillim. 472, and cases cited.

[44] Guy *v.* Sharp, 1 My. & K. 589.

[45] Hurst *v.* Beach, 5 Mad. 351, where the opinion of the Civilians, Drs. Swabey and Lushington, was asked, by the Equity Court:

1. Whether the ecclesiastical courts received evidence of the testator's intention, as to legacies given by the will, and codicil, being cumulative?

2. Whether, in regard to this question, those courts followed the practice and principles of the Civil Law?

rations, unsupported by circumstances, strongly marking their sincerity, and confirming their probability, would be unsafe, and insufficient to repel a presumption of law.[46] The uniform tenor of declarations to confidential friends, is of considerable weight.[47] But declarations are always received, in the ecclesiastical courts, upon the question of making or revoking a will, as corroborative evidence only of the animum testandi, and the animum revocandi. But they must be serious, and unequivocal, to be entitled to any weight.[48]

7. We have before said, that wherever the intention of the testator is sought, his declarations, made at the time, are the most satisfactory evidence upon the point, and are always receivable. This inquiry always arises, in regard to latent ambiguities. The words of the will, applying with equal propriety, or with legal certainty, to two or more subjects, or objects, the decision must be made by determining which was in the mind of the testator, at the time he used these terms. That will ordinarily be restricted to the date of the will. But as the will is ambulatory, during the life of the testator, it may be regarded as speaking, in some sense, from the death of the testator, and from all the intervening period between that and the date of the will. Hence, although the early cases seem to intimate, that declarations of the testator, in such cases, can only be * received, if made contemporaneously with the execution of the will,[49]

The learned doctors answered both questions together, saying, the ecclesiastical courts, in determining whether a legacy was due, followed the practice of the courts of equity, where those courts had established any definite rule for the admission or rejection of evidence; and where they had not, they conformed to the rules of the Civil Law, by which such legacies would be regarded, as prima facie cumulative, but this presumption might be rebutted, by evidence of the testator's intention, and as the Civil Law was silent, in regard to the admission of the declarations of the testator, the ecclesiastical courts would receive them, for the purpose of showing the intention of the testator. See also, Methuen *v.* Methuen, 2 Phillim. 416; Capel *v.* Robarts, 3 Hagg. 165.

[46] Colvin *v.* Frazer, 2 Hagg. 345; Scott *v.* Rhodes, 1 Phillim. 17.

[47] Zacharias *v.* Collis, 3 Phillim. 187; Colvin *v.* Frazer, supra.

[48] Johnston *v.* Johnston, 1 Phillim. 460; Isroell *v.* Rodon, 2 Moore, P. C. C. 62.

[49] Thomas *v.* Thomas, 6 T. R. 671, 678. In this case it was held, that declarations, not made by the testator at the time of the execution of the will, could not be received to show which of two objects, or subjects, answering to the words of the will, were in the mind of the testator when he made use of the words. But two of the judges, Lord *Kenyon*, Ch. J., and *Lawrence*, J., said, if the declarations had been made contemporaneously with the execution of the will, they would have been admissible.

the later cases have altogether denied the soundness of any such distinction.[50]

8. In this case, the declarations were made some months after the date of the will, and were objected to on that account, but were, nevertheless, received. Lord *Denman*, Ch. J., in the conclusion of the opinion of the court, said in substance: None of the cases, which were referred to, in the books, to show that declarations contemporaneous with the will were alone to be received, establish such a distinction. Neither had any argument been adduced which convinced the court, that those subsequent to the will ought to be excluded, wherever any evidence of declarations could be received. They might have more or less weight, according to the time and circumstances under which they were made, but their admissibility depended altogether on other circumstances.[51]

* 9. It is scarcely necessary to discuss the reason, why no distinction can properly be made, in regard to the admissibility of the declarations of the testator, made before and after the execution of the will, and those made contemporaneously with it, in cases of latent ambiguity. But we cannot forbear to suggest, in regard to that attempted distinction, that it seems to have gone upon the very natural misapprehension, that such declarations are admissible solely, as part of the res gestæ. But the real inquiry, in such cases, is, how the testator was accustomed to use the terms found in his will, how he, in particular, understood them. It is like the name Dan, which may be the entire name, or may be a nickname; which may signify Daniel, Danforth, and many other names, perhaps. If, upon inquiry, extrinsic of the will, it appeared that there were two or

But it is noticeable, in this case, that the name found in the will applied to one person, and the description to another, so that the court did not consider that the question of a latent ambiguity, in the ordinary sense, where the words apply with equal propriety to two or more persons, or things, properly arose. It is true, the court say, that the uncertainty arose out of the extrinsic evidence, but not in the ordinary way. And the court finally held the devise void for uncertainty, since they were unable to determine what was the intent of the testator.

The same rule has been adopted in the American states. Vernor *v.* Henry, 3 Watts, 385.

[50] Doe d. *v.* Allen, 12 Ad. & Ellis, 451.

[51] And the same rule extends, equally, to declarations of the testator, made before the execution of the will. Langham *v.* Sandford, 19 Vesey, 649; 1 Jarman, 408. Mr. Jarman here says: "Lord *Kenyon's* dictum in Thomas *v.* Thomas, 6 T. R. 677, seems therefore to be overruled."

more persons of the class answering to that epithet, the question then must be, how did the testator intend to have the term understood; how did he use it? It is always supposable, that the testator had no apprehension, in his own mind, that there were more than one person, or thing, which could be expressed by his language,* or he would have given some explanation, to render it certain. If, then, we find him using the term, either before or after the execution of his will, in one of the meanings inquired after, it becomes certain he did understand the terms, in that sense, at that time. The nearer such use is to the date of the will, the more satisfatory the evidence. But however remote the use, or the declaration of intention, in regard to the matter, there is still some evidence arising from it, of the particular sense in which the testator probably intended to be understood by the language used in his will. The declaration does not depend, for its force, upon the veracity of the person, or the position of his interest, as an admission or declaration, by parties or strangers. But the declaration is, in itself, a *fact*, from which the mind draws the inference of intention, in the use of language in the will, with reference to the same subject.

10. The earliest cases found in the books, in regard to latent * ambiguities, go upon the ground, that the declarations of the testator, showing how he intended the terms, used in his will, to be understood, and how he was accustomed to use such terms, are receivable, as the only clear and satisfactory mode of solving the question. Thus in Lord Cheney's Case,[52] it is said, the younger son, John, may produce witnesses to prove his father's intent; that he thought the other John to be dead, or that he, at the time of the will made, *named* his son, John, the younger; and Lord *Coke* here says, "no inconvenience can arise, if an averment, in such a case, be taken; because he who sees such will ought, at his peril, to inquire which John was meant by the testator, which may easily be known by him who wrote the will, and others who were privy to his intent."[53] And in Reynolds *v.* Whelan,[54] where the testator

* [52] 5 Co. Rep. 68 b.

[53] See also, Jones *v.* Newman, 1 Wm. Black. 60, where evidence was admitted of the intention of the testator, in using the name of John Cluer, there being father and son of that name.

[54] 16 Law J. Ch. 434. And the same course was pursued in Doe d. *v.* Needs, 2 M. & W. 129. See also, Phillips *v.* Barker, 1 Sm. & Gif. 583. In the case of Doe d. *v.* Needs, supra, *Parke*, B., said: "The case is also exactly like that mentioned by Lord Coke, in Altham's Case, 8 Co. 155 a. . . . Another case is put, in

gave a legacy * to his farming man, W. R., he having two farming men of that name, evidence of the testator's declarations, in favor of one of them, was received. In Still *v.* Hoste,[55] the evidence of

Counden *v.* Clarke, Hob. 32; and the same rule was acted upon in the recent case of Doe *v.* Morgan, 1 C. & M. 235. The characteristic of all these cases is, that the words of the rule *do* describe the object, or subject, intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever. It only enables the court to reject one of the subjects, or objects, to which the description in the will applies, and to determine which of the two the devisor understood to be signified, by the description used in the will."

The same rule seems to have been very clearly adopted, and followed, in the American courts. See Doe *v.* Roe, 1 Wend. 541; Ryerss *v.* Wheeler, 22 Wend. 148; Wadsworth *v.* Ruggles, 6 Pick. 63; Haydon *v.* Ewing's Devisees, 1 B. Mon. 111, 113; Ayres *v.* Weed, 16 Conn. 291, 300; Maund's Adm'r *v.* M'Phail, 10 Leigh, 199; Powell *v.* Biddle, 2 Dall. 70; Bartlett *v.* Nottingham, 8 N. H. 300; Hand *v.* Hoffman, 3 Halst. 71; Fish *v.* Hubbard's Adm'r, 21 Wend. 652; Hodges *v.* Strong, 10 Vt. 247. The case of Ryerss *v.* Wheeler, supra, adopts the singular * distinction that declarations *made at the time the will is executed, cannot be received*, but others may.

In Brown *v.* Saltonstall, 3 Met. 423, the subject of the admissibility of extrinsic evidence, to explain the intention of the testator, is very lucidly discussed, and it is very fully shown, that where the words of the will fail clearly to identify, either the subject or object of the bequest, although extrinsic evidence may be given to show the state and condition of the subject-matter, and other incidental circumstances, to place the court in the position of the testator, as far as practicable, to enable them to spell out his meaning, if possible; it is not competent, in such cases, to prove the declarations of the testator, with a view to show in what sense he used the terms found in the will. The learned judge cites 1 Greenl. Ev. § 290; Jackson *v.* Sill, 11 Johns. 201. See also, Brewster *v.* M'Call's Devisees, 15 Conn. 274.

[55] 6 Mad. 192. This is a case where, but for the admission of extrinsic evidence, the will must have been held void for uncertainty. The bequest was to *Sophia* Still, daughter of Peter Still. He had two daughters, Selina and Mary Ann. Except for the descriptive addition, "daughter of Peter Still," the bequest was clearly void, it appearing, that there was no such person as "Sophia Still." But that name being rejected, the bequest stood to "the daughter of Peter Still," and he having two daughters, this made a clear case of latent ambiguity. But some of the early cases held bequests to a son, or daughter, of A. B., he having more than one, at the time, void for uncertainty. Dowset *v.* Sweet, Amb. 175; Doe d. *v.* Joinville, 3 East, 172. But it is said, that a devise to *one* of the sons of A. B., he having more than one, is still void, it being a case of patent ambiguity, and a distinction is therefore taken between that and the case of a devise to the son or daughter of A. B., he having more than one, since in the latter case the ambiguity does not appear, except upon the introduction of extrinsic evidence, and may therefore be removed in the manner that it was produced, like all other latent am-

* the attorney who made the will, and of another person, was admitted, to show what was the intent of the testator in a case of latent ambiguity. So, also, in Price *v.* Page,[56] where the bequest was to —— Price, the son of —— Price, the plaintiff being the only person claiming it, but the executors raised the question, whether the plaintiff's father, to whom the description equally applied, was not entitled to the legacy, evidence was received to show, that the testator said he had provided, or would provide for the plaintiff, and that he had left him something by his will.

11. But if there is any thing in the words of the will which renders the bequest more applicable to one object, or subject, than to any other, that must prevail, and no case for the * admission of extrinsic evidence exists.[57] The devise here was to "Mathew

biguities. 1 Jarman, 400; Lord *Thurlow*, in 1 Ves. Jr., 415; *Tracy*, J., in 2 Venon, 624; Bate *v.* Amherst, Th. Ray, 82. See also, Ashburner *v.* Wilson, 17 Sim. 204.

The distinction, just alluded to, seems too subtle for safe application in practice, and still we are not sure that it is not well grounded in principle. The only doubt which we should have, in regard to the point, is, that a devise to *one* of the sons of A. B., he having but one, is clearly valid, although there seems to be an ambiguity upon the face of the will, so that the apparent uncertainty, upon the face of the will, is susceptible of being removed by extrinsic evidence. And if so, we should have preferred to carry the admissibility of extrinsic evidence to the extent of removing the uncertainty which is really produced by the admission of such evidence. If there is no fatal uncertainty upon the face of the instrument, and that question has to be determined by resort to extraneous evidence, we should prefer to say, that the real ambiguity, where any in fact is found to exist, was really *produced*, rendered *certain*, as it clearly was, by the parol evidence, which will make this a case of latent ambiguity, as well as if the devise had been to the son of A. B. he having more than one. But Mr. Jarman evidently considers the distinction a valid one, and we are not fully prepared to say it is not.

And the leading case of Careless *v.* Careless, 1 Mer. 384, is said by Lord *Abinger*, C. B., in Doe d. *v.* Hiscocks, 5 M. & W. 370, to be, in principle, the same as that of Still *v.* Still, and Price *v.* Page, and the other cases named in this note. The devise being to Robert Careless, my nephew, the son of Joseph Careless, it appeared the testator had no nephew Robert, who was the son of his brother Joseph, as he in fact had no such brother, but he had two nephews, Robert, sons of his brothers, John and Thomas, the *description* of the devisee was, therefore, irrelevant, and wholly void, and the name only remaining, with the addition of my nephew, was definite enough, till it appeared there were two nephews of that name, which made it a clear case of equivocation, according to Lord Bacon's maxim, for the admissibility of extrinsic evidence.

[56] 4 Vesey, 679.

* [57] Doe d. *v.* Westlake, 4 B. & Ald. 57.

Westlake, my brother, and to Simon Westlake, my brother's son." The testator had three brothers, each of whom had a son Simon, but the court held, that upon the legal construction of the instrument, the words "my brother's son," must be referred to the brother named in immediate connection with the language used. The rule must equally prevail, where there appears any thing in the surrounding circumstances to indicate an application of the words, in one direction rather than another.[58]

12. The case of Doe d. *v.* Hiscocks,[59] is now universally admitted to have settled the law upon this point, that "the only cases, in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application to each of several subjects."

13. Parol evidence of intention, from the declarations of the testator, or otherwise, does not seem to have been regarded as admissible to show, that where the description in the will imperfectly applies to one person, and more perfectly to another, the former was really intended. This is not the case of what Lord Bacon regarded as a strict equivocation. There not occurring a precisely equal ground of application of the terms to two subjects, or objects, the case must be determined upon the preponderance in favor of one, as matter of construction, and there is no occasion to resort to extrinsic evidence.[60]

* 14. The declarations of the testator, made after the execution of the will, in regard to its contents, where it is claimed that the testator had been fraudulently imposed upon, in executing the instrument; by not being correctly informed of its contents, may sometimes prove of considerable weight,[61] as he could not state the

[58] 1 Jarman, 404; Jefferies *v.* Michell, 20 Beavan, 15.

[59] 5 M. & W. 363.

[60] Wigram on Extrinsic Evidence, Prop. II. See also, Horwood *v.* Griffith, 4 De G., M. & G. 708. The leading case of Delmare *v.* Robello, 1 Ves. Jr. 412, is very much in point here. See also, Andrews *v.* Dobson, 1 Cox, 425; Holmes *v.* Constance, 12 Vesey, 279; Wilson *v.* Squire, 1 Y. & C., C. C. 654; Maybank *v.* Brooks, 1 Br. C. C. 84. And in Harris *v.* The Bishop of Lincoln, 2 P. Wms. 135, declarations of the testator, at the time he gave instructions to the scrivener, were received to remove a latent ambiguity.

* [61] McNinch *v.* Charles, 2 Rich. 229. It was here held also, that letters of the testator written before the will was made were competent evidence to show that the testator was cognizant of the contents of his will at the time he executed the same. See also, Roberts *v.* Trawick, 13 Alabama, 67. It is here held, that decla-

contents of the instrument unless he had previous knowledge of it. But where such declarations vary from the facts, they do not afford equally satisfactory proof of ignorance of its contents, at the time of its execution, since he may have forgotten ; or he may have had some motive for reserve or disguise.

15. Hence it has been held, as before stated, that in regard to blind persons, where it is important to show that they knew the contents of an instrument executed, as their will, that their declarations to that effect are to be received for that purpose.[62] The principle, upon which this testimony was here received, was, that the point of inquiry was the fact of the testator knowing the contents of his will, at the time of executing it. His declarations, therefore, made while it was under his control, stating its contents truly, contained irrefragable evidence, that he then knew its contents, and afforded the most satisfactory ground to presume that if he had not known the same facts, at the time of its execution, he would have revoked, or altered it, after being made aware of its contents not being what he supposed, at the time he executed it.

*16. It is every day's practice, where the probate of a will is resisted on the ground of it having been obtained by fraud, undue influence, or surprise, and not expressing the free, and unbiassed purposes, and intentions of the testator, to admit his declarations, made before the execution of the will, as to his intentions in regard to the disposition of his property. Hence, where the will is made, in conformity with the repeated declarations of the testator, it excites much less apprehension of its having been obtained by undue influence, fraud, or any improper influences, than where it is an essential, or entire departure from all such previously declared purposes.[63]

17. In a suit to set aside a will on the ground of its having been executed when the testator was incompetent to do the act by reason

rations of the testator, made so short a time before or after the execution of his will, as to constitute a part of the res gestæ, are admissible to show fraud, or undue influence, in its procurement. But when the due execution of the will, and the testator's sanity is proved, by the subscribing witnesses, it will be presumed he knew its purport, although written in a language he could not read. And that he afterwards said "he made it as J. wished, and knew it was wrong," is quite immaterial. Hoshauer *v.* Hoshauer, 26 Penn. St. 404. But see contra, Patton *v.* Allison, 7 Humph. 320.

[62] Harleston *v.* Corbett, 12 Rich. Law, 604 ; ante, § 7, n. 4.

[63] Roberts *v.* Trawick, 17 Alabama, 55.

of drunkenness, his declarations, made subsequent to the time of its execution, "that he never made the will, that, if he signed it, they got him drunk, and made him do it, that he had no recollection of it," are not competent evidence.[64] So, also, the testator's declarations, made both before and after the date of the will, that the legatees, named in the will, "should never have any of his property," and declarations after the date of the will that "he had no will," unsupported by other testimony, do not furnish any evidence whatever of the testator's incapacity, or of undue influence, and are not admissible for that purpose.[65] Nor are the declarations of the testator * admissible to show the existence of a will, at the time they were made.[66]

18. We have extended the discussion of this point so far, and referred to so many American cases, under the different points presented, that we cannot allow much more space for the purpose of discussing particular questions, determined in the different states. The same strict adherence to the words of the will prevails in America, as at common law, and parol evidence is inad-

[64] Gibson *v.* Gibson, 24 Mo. 227. See also, 17 Ala. 55; Patton *v.* Allison, 7 Humph. 320. The harmony of the will with testator's dispositions and affections is to be considered. Allen *v.* Public Admin. 1 Bradf. Sur. Rep. 378. The previously declared intentions of testator are admissible, where undue influence is charged. O'Neil *v.* Murray, 4 Bradf. Sur. Rep. 311.

The apparent injustice of a testator to members of his family, although evidence in regard to the testamentary capacity of the testator, is never regarded as any thing more than a circumstance, and not, in itself, sufficient to invalidate the will. Gamble *v.* Gamble, 39 Barb. 373.

[65] Cawthorn *v.* Haynes, 24 Mo. 236.

*[66] Betts *v.* Jackson, 6 Wend. 187. In Tennessee, where olograph wills, "found among the valuable papers and effects" of the deceased, are recognized as valid, by statute, the declarations of the testator are admissible to show a compliance with the requirements of the statute. Marr *v.* Marr, 2 Head, 303. It was decided in New York, at an early day, as before stated, Jackson *v.* Kniffen, 2 Johns. 31, that while it was competent to prove by parol, that the testator executed the will under duress, his own declarations to that effect, made after the execution, were not admissible for that purpose. But in a late case in Michigan it was held, that where, after the death of the testator, a will, twenty-five years old, was discovered in a barrel, among waste papers, and either torn or worn into several pieces, which were scattered, loose, among the papers in the barrel, that the declarations of the testator, made after the date of the will, were admissible, not as separate and independent evidence of revocation, but as tending to explain, whether the instrument was thus torn, accidentally, or with intent to revoke. Lawyer *v.* Smith, 8 Mich. 411.

missible, to show the intent of the testator, in a will ambiguously expressed, although the consequence of its rejection will be, to render the instrument wholly inoperative, on the ground of uncertainty.[67]

[67] Hand *v.* Hoffman, 3 Halst. 71; Wootton *v.* Redd's Ex'r, 12 Gratt. 196; Kelly *v.* Kelly, 25 Penn. St. 460. Declarations made after the execution of a will, cannot be received to show what the testator intended by the terms "nephews and nieces." Cromer *v.* Pinckney, 3 Barb. Ch. 466. And the rule would be the same, in regard to declarations made at the time of its execution. These propositions have been repeatedly recognized in most of the American states. Weston *v.* Foster, 7 Met. 297; Osborne *v.* Varney, id. 301.

It seems to be a universally received doctrine in the American courts, that extrinsic evidence of the declarations of the testator, whether made at the time, before, or after the execution of the will, cannot be received to show the * intention of the testator, by the use of particular words therein, or by its general scope, as that by the use of the word "children," he meant to include step-children, Fouke, *v.* Kemp, 5 Har. & J. 135; Asay *v.* Hoover, 5 Penn, St. 21; or that a bequest to the parent, was intended for the children of such parent, who was known by the testator to have deceased, Judy *v.* Williams, 2 Carter, 449; or that the term children was intended to include illegitimate children, 2 Sneed, 618; Shearman *v.* Angel, Bailey, Ch. 351; or in any sense to vary the express provisions of the will, or to show in what sense he used well-settled terms of law, Aspden's Estate, 2 Wallace, Jr., 368; Gregory *v.* Cowgill, 19 Mo. 415; Allen *v.* Allen, 18 How. 385. It is here said, that evidence of extrinsic circumstances, such as the amount and condition of the estate, &c., cannot be received to control the interpretation of the will; but that it is only admissible to explain ambiguity, arising out of extraneous circumstances. But it is evident that the learned judge does not here mean to include the proof of such circumstances as will tend to put the court in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will, since this is expressly recognized as proper evidence in all cases, and that without such information it must often happen that the will could not be sensibly construed, but it was only intended to exclude all such proof, so far as it tended to "show a different intention in the testator from that which the will discloses. Weatherhead *v.* Baskerville, 11 How. (U. S.), 357.

The learned surrogate of New York, in Ex parte Hornby, 2 Bradf. Sur. Rep. 420, seems to suppose, that the courts in that state have not gone the length, which he admits to be the fact, in the English courts, of rejecting all proof of the declarations of the testator, with a view to show his intentions, for the purpose of aiding the construction of a will, except in the single case of a latent ambiguity; and declared, that it is competent to give evidence of the testator's declarations at the time of making the will, where, as the will is written, there is no one to answer the precise description in the instrument. This was where the legacy was to "James, son" of testator's "brother Frederic," proof was admitted, by the testimony of the scrivener and others, that the legacy was intended for "Frederic, son of James," whom the testator expressed as "James' son, Frederic," and the scriv-

* 19. The courts of equity have, in some of the American states, assumed to correct mistakes in wills, as where the name * of one child was inadvertently omitted,[68] or to supply a clause, omitting a devise of residue.[69] But as a general rule, we apprehend no such omission can be supplied by parol.[70]

20. It seems to be settled, that mere mistakes in the execution of a will, where no fraud is imputable to the parties * interested, or their agents, cannot be corrected in a court of equity.[71] Thus,

ener confounded, and thus transposed the names. But, with all due respect for the opinion of so learned and experienced a judge, we cannot but feel, that the direct evidence of intention, as proved by the declaration of the testator, and the testimony of the scrivener, as to the mistake * in writing the will, should not have been received. If the will could have been made to conform to the extraneous facts, by transposition of words, or sentences, it was no doubt allowable to do so, but otherwise the bequest must have failed, since it is not competent to foist any new word into the will, by means of extrinsic evidence. And drawing one word into the place of another, by mere extrinsic evidence, is making a new will. All the legacies might be made dependent upon parol evidence in this same way, and the words of the will become a mere shadow; ante, § 34, n. 7. See, also, Connolly *v.* Pardon, 1 Paige, 291; Smith *v.* Smith, 1 Edw. Ch. 189; Root *v.* Stuyvesant, 18 Wend. 257.

In Ohio, the strict rule prevails, excluding extrinsic evidence, when offered to vary, contradict, or supply any omission, or apparent ambiguity, in the will. Worman *v.* Teagarden, 2 Ohio, N. S. 380. And the same rule prevails in Maryland. Walston *v.* White, 5 Md. 297.

And there are some cases, where it seems the court have pressed the rules of law somewhat beyond their legitimate office, in order to reach the necessities of the case, as where extrinsic evidence was received to show the testator's intent, by a bequest of a slave and her increase. Reno *v.* Davis, 4 Hen. & Munf. 388. The cases are almost innumerable, where extrinsic evidence was received to identify the subject-matter, even where the description was very imperfect. Maund *v.* McPhail, 10 Leigh, 199; Pitchard *v.* Hicks, 1 Paige, 270.

And it has been held, that parol evidence is not admissible to show that the testator did not intend that his will should have its full and legitimate operation, Reeves *v.* Reeves, 1 Dev. Ch. 386; or that, in a bequest to the executors, they were intended to take in trust for the next of kin, Ralston *v.* Telfair, 2 Dev. Ch. 255; or that a devise for the support of children, generally, was intended for a particular class, Whilden *v.* Whilden, Riley, Ch. 205; or to create a trust by an absolute devise, Elliott *v.* Morris, 1 Harp. Ch. 281; or that a bequest was intended to be in lieu of dower, Timberlake *v.* Parish, 5 Dana, 345; or to supply a clause, omitted in a devise by mistake, Webb *v.* Webb, 7 Monr. 626.

[68] Geer *v.* Winds, 4 Dessaus. 85.

[69] Webb *v.* Webb, 7 Mon. 626.

[70] Abercrombie *v.* Abercrombie, 27 Ala. 489.

* [71] Story, Eq. Jur. ed. 1861, § 180 a.

where any statutory requirement does not appear on the face of the will,[72] or where the name of a wrong legatee is inserted, by mistake of the scrivener,[73] or where the subject-matter of the intended devise is not fully expressed, no relief in equity will be afforded.

21. But we have before shown, that so far as the procurement of a will, or any of the provisions of a will, is based upon the fraudulent suppression of truth, or the suggestion of falsehood, it is void and inoperative, as to all parties, who have, in any manner, either directly or indirectly, participated in the fraud.[74] And a will procured by fraud, or undue influence, is void, even where the party benefited is innocent of all participation in such fraudulent practices.[75] And in all similar cases, it is undoubtedly true, that the courts of equity will lend their aid, where the remedy is not fully adequate in the courts of law. But as all questions of this character will arise upon the probate of the will, and become conclusively settled by the decree upon that matter, in most of the American states, both as to real and personal estate, it is not common in practice, that any resort to a court of equity becomes important.

SECTION IV.

LATENT AMBIGUITIES AND THE MODE OF THEIR REMOVAL.

1. This, one of the most extensive grounds for receiving parol evidence.
2. Cannot be received to add to the will itself.
* n. 2. Discussion of the case of Miller *v.* Travers.
3. Definition of the grounds upon which it is to be received.
4. The case of Hiscocks *v.* Hiscocks discussed.
n. 3. Discussion of the general subject, as presented in Hiscocks *v.* Hiscocks.
5. The early English cases, and most of the American cases, do not come up to the precise rule.
6. The familiar illustration of the text-books clearly defines the rule.
7. Where the extrinsic evidence fails to remove the ambiguity, the devise fails.
8. Lord Cheney's case.
9. Jones *v.* Newman; Careless *v.* Careless.
10. Morgan *v.* Morgan.
11. Imperfect and mistaken descriptions aided by parol.

[72] Nutt *v.* Nutt, 1 Freem. Ch. Miss. 128.

[73] Yates *v.* Cole, 1 Jones, Eq. 110; Bennett *v.* Marshall, 2 Kay & J. 740; Goode *v.* Goode, 22 Mo. 518.

[74] Ante, § 38, pl. 20, n. 26.

[75] Brown *v.* Moore, 6 Yerg. 272.

12. Parol evidence not admissible to defeat a bequest to a known person, living.
13 But if it had been given to a person deceased, it would not be void under statute.
14. Bequest to "society in London," cannot be carried by parol to one out of London.
15. But a defective description of legatee may be aided by parol.
16. And if description applies in part to two societies, direct evidence of intent admissible.
17. And very imperfect descriptions may be sufficient, where only one person claims.
18. Wrong description will not vitiate a devise, where the intent is clear.
n. 22. The principle of the decision, in Thomas *v.* Thomas, stated.
19. The use of nicknames may be explained, by parol.
20. The case of Beaumont *v.* Fell, considered.
n. 24. Early cases considered, and their discrepancies from the present rule, stated.
21. Late case in Pennsylvania, where description prevailed over name.
22. Distinction between latent ambiguities and defective designation.
23. Latent ambiguity in regard to two grandsons of testator of same name.
24. The name, if applicable to a living person, will control description.
25. Mistake of words in drawing will, not corrected by extrinsic evidence.

§ 40. 1. THE greatest scope for the admission of parol evidence, in explanation of the intention of the testator, arises in regard to what are denominated latent ambiguities. These are so called, since they are not apparent upon the face of the will, but arise from the proof of facts outside the will, showing that the words of the instrument, although apparently definite and specific, in themselves, are, nevertheless, susceptible of an * application, with equal propriety, to two or more different subjects or objects.[1]

2. It has often been decided, that parol evidence is not admissible, to help out an imperfect description in a will; by which is to

* [1] We say with equal propriety, for unless that is the case, no ambiguity can fairly be said to arise; for the general rules of construction, applicable to all written instruments, require that the words shall be applied to those subjects and persons, to which they will apply with the greatest accuracy. Hence, it is said, in the language of Lord Bacon's maxim, that unless there arise a strict case of equivocation, there is no occasion to resort to parol evidence. Herrick *v.* Noble, 27 Vt. 1; where it is said, that parol evidence is not to be received to show that terms in a written contract were used in an unusual and extraordinary sense. But in a very late case, Smith *v.* Ruger, 5 Jur. N. S. 905, where a testator gave a legacy of £10,000, to the German hospital at Dalston, desiring that the sum should be laid out in completing the almshouses, then in course of erection, in connection with the hospital; but declaring, that notwithstanding his desire, so expressed, it should be lawful to apply the legacy to the general purposes of the charity. The German Hospital never had any almshouses, nor were there any in course of erection. There was another charity for the relief of foreigners in distress, which was building almshouses, but not at Dalston. Held, that there was a sufficiently clear and valid gift to the German Hospital at Dalston.

be understood, one so defective, that without the aid of extrinsic evidence, by way of making an addition to the will itself, it could not have any legal operation.[2] But if, * through the aid of extrin-

[2] Miller *v.* Travers, 8 Bing. 244. This is a leading case upon this question, the importance of which will justify some enlargement upon the principles involved. The case was that of a devise of all the testator's freehold and real estates in the county of Limerick, and city of Limerick. The testator had no estates in the county of Limerick; a small estate in the city of Limerick, inadequate to meet the charges in the will; and considerable estates in the county of Clare, not mentioned in the will. It was held, that the devisee could not be allowed to show, by parol evidence, that the estates in the county of Clare were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations, not affecting the estates in the county of Clare, and that by mistake he erased the words "county of Clare," and that testator, after keeping the altered will by him for some time, executed it, without adverting to * the alteration. Chief Justice *Tindal*, in giving judgment, maintained the following propositions:

1. That it is a universally established rule, for the construction of wills, that the testator's intention is to be gathered from the words used in the will, and that words which he has not used, cannot be added, as was held in Denn d. Briddon *v.* Page, cited in Hay *v.* The Earl of Coventry, 3 T. R. 87; where the court held, that sufficient did not appear, on the face of the will, to warrant them in saying that an estate of inheritance was given; that if it were left to conjecture, they might suppose that some mistake was made, but they could not determine, on conjecture, nor put that in the devisor's mouth which he had not said. See also, Del Mare *v.* Rebello, 3 Br. C. C. 446.

2. That a complete blank, in the name of the legatee, cannot be supplied by extrinsic evidence. Hunt *v.* Hort, 3 Br. C. C. 311, where it was held, that a bequest of pictures to Lady ——, was absolutely void, and the defect could not be supplied by parol evidence. Baylis *v.* Attorney-General, 2 Atk. 239. But it has been held, that where but part of the name is omitted, as the Christian name only, it may be supplied. Abbot *v.* Massie, 3 Vesey, 148; Price *v.* Page, 4 Vesey, 679; Bradshaw *v.* Thompson, 2 You. & C. 295. But parol evidence may be received to aid the construction, so as by that means to render the terms of the will itself intelligible. Stockdale *v.* Bushby, 19 Vesey, 381. But in these imperfect descriptions, if the parol evidence fails to point out which was intended by the testator, the bequest must fail for uncertainty, as in other cases of latent ambiguity. 1 Jarman, 413, ed. 1861.

3. That a new subject-matter, or a new devisee, where the will is entirely silent upon either point, cannot be imported, by parol evidence, into the will itself. That there is no difference between the introduction of a new devisee and a new subject-matter. Doe d. Oxenden *v.* Chichester, 4 Dow, P. C. 65; Newburgh *v.* Newburgh, in Miller *v.* Travers, supra.

But in the case of Miller *v.* Travers, the court allowed an issue to be tried by jury, to determine whether one of the sheets, claimed as part of the will, really formed part of it, at the time of execution; and such an issue must, of necessity,

sic evidence, in reference to the condition of the subject-matter, or of the persons answering the * description, the meaning can be obtained by construction merely, the will must be upheld.

3. But upon the general question of the admissibility of extrinsic evidence, to render certain the intention of the testator, by removing a latent ambiguity, the cases are, as might be expected, very numerous; and many which have professed to be decided upon this ground, do not appear to be entirely reconcilable with the principle upon which such evidence is admissible, namely, to remove an ambiguity arising extraneously, and where it is found that the words apply with equal propriety to different subjects, or persons; or as some of the cases express it, where the words apply with legal certainty to different subjects, or persons, so that if there were but one, either might fairly be comprehended, under the words of the will.[3]

be determined, by resort to general evidence of the acts and declarations of the testator, at the time of execution. See also, 1 Greenleaf, Ev. § 290.

As the opinion, in the case of Miller *v.* Travers, was the result of a hearing before the Chancellor, Lord *Brougham*, Lord *Lyndhurst*, Ch. B., of the Court of Exchequer, and *Tindal*, Ch. J., of the Common Pleas, and is regarded as the * leading opinion upon the question, we should be glad to give the substance of it, if our space were not too much occupied by other matters.

The learned judge, *Tindal*, Ch. J., here suggests, that all the cases upon the question of latent ambiguity range themselves under two classes:

1. Those where the description of the devisee, or of the subject-matter of the devise, is clear upon the face of the will, but upon inquiry it is found, that the words describe two or more persons, or things, with equal accuracy, so that unless it can be shown, by extraneous evidence, to which the testator really intended his words to apply, the devise must fail for uncertainty. This class contains all the cases of strictly latent ambiguity.

2. The other class named by the learned judge, is where the description of the devise, or of the devisee, is correct in part, and in part incorrect, as where the name of the devisee is correctly given, but his residence, or his relation to the testator, or some other circumstance, descriptive of the person, is not accurate, or an estate is described, as being in the occupancy of B, when in fact it is in that of A. But this latter class of cases is more commonly disposed of as matter of construction, or upon the maxim, falsa demonstratio non nocet, and is not strictly one of latent ambiguity.

[3] Hiscocks *v.* Hiscocks, 5 M. & W. 363. This is the most elaborate case, perhaps, which has been decided upon this question, and the opinion of Lord *Abinger* contains the best commentary upon the conflict of the decisions which we can give. "It must be owned, however," says his lordship, "that there are decided cases, which are not to be reconciled with this distinction in a manner * altogether satis-

*4 In the case of Hiscocks *v.* Hiscocks, the rule in regard to admitting the declarations of the testator is thus expressed by

factory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of Doe *v.* Huthwaite, 3 B. & Ald. 632, and Bradshaw *v.* Bradshaw, 2 You. & C. 72; the only thing decided was, that, in a case like the present, some parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that when the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words — and one in which the testator meant to use them — the devise may have a full effect. Thus, again, in Cheyney's case, 5 Co. Rep. 68, and in Counden *v.* Clerke, Hobart, 32, 'the averment is taken' in order to show which of two persons, both equally described within the words of the will, was intended by the testator to take the estate; and the late cases of Doe d. Morgan *v.* Morgan, 1 C. & M. 235, and Doe d. Gord *v.* Needs, 2 M. & W. 129; both in this court, are to the same effect. So, in the case of Jones *v.* Newman, 1 W. Bl. 60, according to the view the court took of the facts, the case may be referred to the same principles as the former. The court seem to have thought the proof equivalent only to proof of there being two J. C.'s, strangers to each other, and there the decision was right, it being a mere case of what Lord Bacon calls equivocation.

"The cases of Price *v.* Page, 4 Ves. 680; Still *v.* Hoste, 6 Madd. 192; and Careless *v.* Careless, 19 Vesey, 601, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate), equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in Price *v.* Page, supra, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In Selwood *v.* Mildmay, 3 Vesey, 306, evidence of instructions for the will was received. That case was doubted in Miller *v.* Travers, 8 Bing. 244, but perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice *Tindal*, in Miller *v.* Travers, supra, be considered as being only a wrong application to the facts of a correct principle of law. Again, in Hampshire *v.* Peirce, 2 Ves. Sen. 216, Sir *John Strange* admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, 'the four children of my niece, Bamfield,' she meant the four children by the second marriage. It may well be doubted, whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with

* the learned judge, whose language is always remarkable for clearness and perspicuity: "There is but one case, in which * it

which Sir *J. Strange* is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. Beaumont *v.* Fell, 2 P. Wms. 141, though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This and other circumstances of the like nature, which were equally admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received at Nisi Prius, in Thomas *v.* Thomas, 6 T. R. 671, and approved on a motion for a new trial, by the dicta of Lord *Kenyon* and Mr. Justice *Lawrence*. But these cases seem to us at variance with the decision in Miller *v.* Travers, supra, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of Miller *v.* Travers, supra), to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial.

"Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were res integra, we should be much disposed to hold the devise void for uncertainty; but the cases of Doe *v.* Huthwaite, supra; Bradshaw *v.* Bradshaw, supra, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can * clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty." See also, 1 Greenleaf's Ev. § 290.

It seems but the merest truism to repeat the text of most of the cases. Nor do such trite sayings in the law of evidence always convey clear and well-defined ideas. We find it, for instance, repeated, a thousand times over, in all the cases, and all the books, upon the subject, that parol evidence cannot be received to explain a patent ambiguity, that is, one apparent upon the face of the will. And still every lawyer and every judge understands, that there is scarcely a day passes in courts, where some such ambiguity, in regard to writings, is not removed by construction, and such construction aided, either by the proof of extraneous circum-

appears to us, that this sort of evidence of intention can properly be admitted, and that is where the meaning of the * testator's

stances, or by the practical knowledge of the judge assuming such facts. The scientific evidence, which now occupies so much time in court, in trying cases of contract often, is all addressed to the point of removing ambiguities upon the face of writings, by fixing the import of the terms. Thus, it is said, in construing a will, the court may look to the state of the testator's property, and the number, necessities, and character of his family, at the time when the will was written. This must be shown by parol. Woods *v.* Woods, 2 Jones, Eq., 420; Stevenson *v.* Druley, 4 Ind. 519; Travis *v.* Morrison, 2 Alabama, 494; Rewalt *v.* Ulrich, 23 Penn. St. 388; Billingslea *v.* Moore, 14 Ga. 370; Wootton *v.* Redd's Ex'r, 12 Grattan, 196. But this is not allowed, where the intention of the testator is clear upon the face of the will. Brearly *v.* Brearly, 1 Stockton, 21; Perry *v.* Hunter, 2 R. I. 80.

It is said, too, that circumstances indicating the state of the testator's affections towards the objects of his bounty, and the relative condition of those looking to him for aid, or support; and even the declarations of the testator, or his acts, in regard to the thing given, the relative amount of advancements, and the comparative value of different portions of the estate, are always admitted as proper evidence to remove latent ambiguities. Brownfield *v.* Brownfield, 12 Penn. St. 136. And we have before stated, that all this class of testimony is receivable, in all cases, where the construction of a will comes in question, to enable the court to place themselves in the condition of the testator at the time * he executed the same, which is, in fact, an aid towards the removal of all ambiguities arising from the will; whether more or less apparent upon its face. This is done, more commonly, perhaps, by aiding the application of the terms used to the subject-matter, and the objects described which is rather a latent than a patent ambiguity.

But it is not competent to show, that the testator made the will under a misapprehension, as to one of his children being dead. Gifford *v.* Dyer, 2 R. I. 99. And it is certain the language of a will cannot be varied, or omissions supplied, or apparent ambiguities removed, by extrinsic evidence, addressed directly to that point. Worman *v.* Teagarden, 2 Ohio St. 380; Mitchell *v.* Mitchell's Lessee, 6 Md. 224; Abercrombie *v.* Abercrombie, 27 Alabama, 489; nor where the ambiguity is not, in some measure, produced by the application of extraneous circumstances. Canfield *v.* Bostwick, 21 Conn. 550; Judy *v.* Williams, 2 Carter, 449; Arthur *v.* Arthur, 10 Barb. 9. Nor can it be received to show, that certain words were intended to create particular estates. Johnson *v.* Johnson, 32 Alabama, 637; Hyatt *v.* Pugsley, 23 Barb. 285; President of Deaf and Dumb Inst. *v.* Norwood, 1 Busbee, Eq. 65. Nor to show that testator meant something different from what his language imports. Walston *v.* White, 5 Md. 297; Gregory *v.* Cawgill, 19 Mo. 415; Horwood *v.* Griffith, 23 Eng. Law & Eq. 411.

Nor can one who draws a will, be allowed to testify to the meaning intended by ambiguous words, unless in case of a latent ambiguity. McAllister *v.* Tate, 11 Rich. Law, 509; Coffin *v.* Ellcote, 9 Rich. Eq. 244; Bradley *v.* Bradley, 24 Mo. 311. This is all which was decided in Button *v.* Am. Tract Society, 23 Vt. 336; but the remarks of the judge, and the marginal note, might seem to apply the same rule

words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but from * some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each

to cases of latent ambiguity, which was not intended, and would be in conflict with the whole current of authority upon the subject; and equally, with the very principle upon which parol evidence is received, to explain latent ambiguities.

It is an universal rule of evidence, in regard to all written contracts, that parol evidence may be received to show the application of the words to the subject-matter. Brownfield *v.* Brownfield, 20 Penn. St. 55; Deaf and Dumb Inst. *v.* Norwood, 1 Busbee, Eq. 65; Winkley *v.* Kaime, 32 N. H. 268; Anstee *v.* Nelms, 38 Eng. Law & Eq. 314; Rom. Cath. Orphan Asylum *v.* Emmons, 3 Bradf. Sur. Rep. 144; Den *v.* Cubberly, 7 Halst. 308; Riggs *v.* Myers, 20 Mo. 239; Douglas *v.* Blackford, 7 Md. 8; Holton *v.* White, 3 Zab. 330; Spencer *v.* Higgins, 22 Conn. 521. And where there is a latent ambiguity in a will, which * we have before defined, § 40, pl. 3, direct evidence may always be received of the intention of the testator, at the time of making the will. In addition to the cases named above, the following may be referred to on this point. Evans *v.* Hooper, 2 Greene, Ch. 204; Ex parte Hornby, 2 Bradf. Sur. Rep. 420; Hart *v.* Marks, 4 Bradf. Sur. Rep. 161; Horckenusmith *v.* Slusher, 26 Mo. (5 Jones), 237: Cresson's Appeal, 30 Penn. St. 437; Billingslea *v.* Moore, 14 Ga. 370; Douglas *v.* Fellows, 23 Eng. L. & Eq. 238; Domestic and Foreign Missionary Society *v.* Reynolds, 9 Md. 341; Stokeley *v.* Gordon, 8 Md. 496; Lowe *v.* Carter, 2 Jones, Eq. 377. The purpose of admitting extrinsic evidence is always to determine what the terms used represented, in the mind of the testator. Walston *v.* White, 5 Md. 297. There are many exceptional cases, not coming fully within the generally recognized canons for the admission of extrinsic evidence. Thus, in Gass *v.* Ross, 3 Sneed, 211, in case of a bequest for the benefit of the "children of G. S. District," there being no district of that name, evidence of the testator's own declarations was received to determine which of the several districts was intended by him.

The point is thus defined in Hart *v.* Marks, 4 Bradf. Sur. Rep. 161. Parol proof may always be used to apply a will, that is, to ascertain the person intended by the testator, by a description, which though not ambiguous on its face, cannot be applied precisely as expressed in the instrument. The plain terms of an instrument cannot be altered by showing the testator's declarations. The writing must prevail and be interpreted by its own language; but it is competent to point out, by proof, the person who answers the description of a legatee, and if there be no person who exactly meets the description, the person intended may be ascertained by means of extrinsic evidence. But according to the English cases, this last statement is not precisely accurate, as we shall see hereafter. Where no case of latent ambiguity arises, parol evidence of intention is not admissible. Waugh *v.* Waugh, 28 N. Y. Rep. 94; Charter *v.* Otis, 41 Barb. 525; King *v.* Ackerman, 2 Black, 408. Very great aid may legitimately be derived from extrinsic evidence where the description is defective only. Howard *v.* Am. Peace Society, 49 Maine, 288. See also, American Bible Society *v.* Pratt, 9 Allen, 109; Bodman *v.* Am. Tract Society, id. 447.

answering to the words in the will), the testator intended to express."

5. It is certain that many of the early cases, in England, in regard to wills, and the admissibility of parol evidence, to fix, or aid in, their construction, and most of the American cases upon the subject, do not come up to the precise and perfect line here marked out.

6. The familiar illustration used by the text writers upon the subject, is precisely according to the rule laid down by Lord * *Abinger*, C. B.[4] Thus, where the testator devises his manor of Dale, and it turns out, that at the date of his will, he had two manors of Dale, North Dale and South Dale, this produces what Lord Bacon calls an equivocation, and evidence may be adduced to show which of them was intended.[5] And Prof. Greenleaf adopts the same view substantially.[6]

7. So where the testator devised his close in Turton, in the occupation of J. W., it was held, that of two closes there, in the occupation of J. W., it was competent to show by parol which the testator intended to have pass by his will. But the parol evidence tending only to show, that the testator, at the time of making his will, supposed both of these closes to constitute but one, and that he intended to give both, under the words used, it was held, that it was not competent thus to vary the import of the will; and that unless that could be done, it was impossible to determine which of the two closes the testator did intend, or would have preferred to have pass, if the idea had been present to his mind, that both could not pass, under the will; there was, therefore, upon the necessary legal construction, an inexplicable uncertainty, and that the devise was consequently void, for uncertainty.[7]

[4] 5 M. & W. 369.

[5] 1 Jarman, 401; 1 M. & Scott, 343.

[6] 1 Greenleaf, Ev. § 291. "But declarations of the testator, proving, or tending to prove, a material fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words, are, on the principles already stated, admissible. These cases, however, will be found to be those only, in which the description in the will is unambiguous in its application to any one of several subjects."

[7] Richardson *v.* Watson, 4 Barn. & Ad. 787. Lord *Denman*, Ch. J., in giving judgment, said: "As therefore it is not ascertained, either by the words of the will, or by the evidence given to explain them, what the testator intended, the devise is void, for uncertainty, and the heir at law is entitled to recover. This is not a

* 8. So where the testator, having had two sons, both baptized by the same name, and the elder had been long absent and he supposed him dead, devised his lands, generally, to his son of that name, both being in fact living, it was held, that the younger son might be allowed to prove, by parol, that at the time of making his will, the testator supposed the elder son dead, or that at the time of making the will, the testator named the younger son.[8]

* 9. So also, where a devise was to John Cluer of Calcot, and it appeared that there were two of that name, father and son, it was claimed the father was, prima facie, entitled, but the whole court were agreed, that the son might adduce parol evidence that the

case of an election; for an election can take place only where the intention of the devisor or grantor is clear, that out of a mass, a certain portion should be selected."

[8] Lord Cheney's Case, 5 Co. 68 b. And it is here said, "If no direct proof can be made of his intent, the devise is void for the uncertainty." Mr. Jarman says, vol. i. 402, n. (d): "But the effect of the doctrine is to render it necessary to the completeness of a title derived under a devisee, that it should be ascertained, that there is not more than one person answering to the description; but this is seldom attended to in practice, unless some discrepancy occurs between the terms of the will and the actual name, or addition, of the claimant." This is upon the very obvious ground, that the natural presumption is, that if there had been more than one person, known to the testator, answering the general name, or description used, he would have adopted some more specific designation. And we think it fair to refer all such cases to the natural prescription, that there is but one person answering to any one name. So that, prima facie, all devises and bequests, naming the person intended to be benefited, are supposed to be thereby rendered entirely certain, until it appears that another person has the same name. This is all that is meant by the ambiguity arising by parol. If it were not so, then every devise, and indeed every written instrument, might justly be said to be uncertain by presumption, since it could never be absolutely certain, even after the most diligent investigation, that there did not exist some state of facts, which might raise some uncertainty, in regard to the application of the will to existing facts. It is, therefore, always safe to presume that no such embarrassment exists, until it occurs, both upon the ground that such is the fact, in the majority of cases, and that, where counter claims exist, they are likely to be early brought into notice. It seems to us, therefore, that Mr. Jarman's presumptive embarrassment has no existence in fact, and that, practically, and with merely common-sense men, it could not fail to be regarded, as a ludicrous refinement, in investigating title, to raise the inquiry, whether there were not other persons of the same name and description, who might embarrass the title, by interposing a claim under the will or deed! Such cases occur so seldom, and, when they do occur, are so early and so generally known, that any such gratuitous inquiry, where nothing existed to call it forth, might fairly be regarded as scarcely less than absurd.

testator intended the devise for him.[9] And, as we have before stated, where the testator gave a legacy to his nephew Robert, the son of his brother Joseph, and it appeared that he had two nephews of the name of Robert, one the son of his brother John and the other of his brother Thomas, and that he had no brother Joseph, it was held, that parol evidence was admissible to show which of the two nephews he intended, the addition being merely void, and as was said by Sir *William Grant*, Master of the Rolls, in giving judgment, "a mere slip of the pen." And it appearing that the testator was intimately acquainted with one of his nephews by the name of Robert, and that the other was very little known to him, so much so that it was uncertain whether his Christian name was known to him at all, it was held, that the first was entitled to the legacy.[10]

10. And where the testator had two nephews of the name of Morgan Morgan, one of whom resides at the village of Mothvey, and in his will devised certain property to his nephew Morgan Morgan, and also certain other property to his nephew Morgan Morgan of the village of Mothvey, it was contended, that the devises, on the face of the will, were to be construed as intended for the different nephews, and that, therefore, parol evidence was not admissible, but the court held, that the case was within the ordinary rule, admitting parol evidence.[11]

11. And where the description of the subject-matter of the devise is mistaken, parol evidence has been admitted to aid the construction, by showing to what the testator must have *referred. As where, on a devise of a house and lot in Fourth Street, Philadelphia, it appeared the testator had no property in Fourth Street, but did own a house and lot in Third Street, in that city, it was held such property passed under the devise.[12] And where the devise was of "thirty-six acres, more or less, of lot 37 in the second division in Barnstead," and there was no such lot in the second division in that town, but the testator owned a portion of lot 97 in that division, it was held to pass under the devise.[13]

*[9] Jones *v.* Newman, 1 W. Bl. 60. "The objection arose from parol evidence and ought to have been encountered by the same; per totam curiam."

[10] Careless *v.* Careless, 1 Mer. 384; s. c. 19 Vesey, 601; post, § 41, pl. 29.

[11] Doe d. Morgan *v.* Morgan, 1 Cr. & Mee. 235.

*[12] Allen *v.* Lyons, 2 Wash. C. C. 475. See Riggs *v.* Myers, 20 Mo. 239.

[13] Winkley *v.* Kaime, 32 N. H. 268. See also, Jackson *v.* Goes, 13 Johns. 518; Pritchard *v.* Hicks, 1 Paige, 270; Pinson *v.* Ivey, 1 Yerger, 296; Wusthoff *v.* Dracourt, 3 Watts, 243; Gass *v.* Ross, 3 Sneed, 211; Doe *v.* Roe, 1 Wendell,

12. But where the words of the will apply with legal certainty to a living person, as in case of a bequest to my niece, Elizabeth Stringer, the testator having a grandniece of the name Elizabeth Jane Stringer, and no other relative of the name of Stringer, who was called Elizabeth, then living, but had had a niece of the name of Elizabeth Stringer, many years deceased, and whose funeral he attended, it was held, that extrinsic evidence was not admissible to show that this portion of the will was copied by the scrivener from a former will, made while the testator's niece, Elizabeth Stringer, was living, the scrivener not being aware of her decease, and that the devise was really intended for her.[14] The Master of the Rolls, Sir *John Romily*, said: "Here the language of the will is applicable to two or more persons, who answer the description of the will, and each of them standing alone would be entitled to take. If there had been another Elizabeth Stringer, living, parol evidence would have been admissible to ascertain which it was the testator intended to * designate. But in this case the court is asked to admit parol evidence, not for the purpose of explaining the meaning of the testator, but for the purpose of showing that he had no meaning at all — in fact for the purpose of expunging the words from the will altogether."

13. But as this will was dated in January, 1852, and the statute[15] then in force provided, that if any legatee or devisee in a will, should decease before the testator, which has been held to extend to one deceased at the date of the will, the bequest shall descend to the issue of such person, the same as if the decease had occurred immediately after that of the testator, it seems somewhat questionable, whether the effect of the evidence offered was to expunge the bequest from the will. And if it did have this effect, by defeating a bequest never intended, we could scarcely feel justified in rejecting the evidence, merely upon the ground, that one of the persons answering the description had deceased. That fact might have a controlling effect upon the decision of the case, but it scarcely seems sufficient to exclude all other evidence upon the point.

541; Storer *v.* Freeman, 6 Mass. 440, 441; Watson *v.* Boylston, 5 Mass. 417, 418; Tudor *v.* Terrel, 2 Dana, 49; Hand *v.* Hoffman, 3 Halst. 78; Breckenridge *v.* Duncan, 2 A. K. Marshall, 51; Haydon *v.* Ewing, 1 B. Mon. 113; Capel *v.* Robarts, 3 Hagg. 156.

[14] Stringer *v.* Gardiner, 5 Jur. N. S. 260.

[15] 1 Vic. § 26.

14. It was held, too, in a recent English case,[16] that extrinsic evidence is not admissible to show, that a bequest to a society named as being in London, was intended for a society of that name out of London, there being no society of that name in London. But there could be no question if there had been two societies of that name, in London, the testimony must have been received. And it is difficult to comprehend why the maxim, falsa demonstratio, does not apply to the case. There are many instances in the books, where proof of circumstances in similar cases has been received, to aid the court in fixing the true construction of certain provisions of wills, where effect has been given to some provisions, by rejecting a portion of the description as irrelevant or unimportant.

* 15. And it seems entirely well settled, that an imperfect description of a person, natural or corporate, may be aided by parol evidence. Thus, where the testator gave a bequest to the "missions and schools of the Episcopal Church, about to be established, at or near Point Cresson," and the evidence showed that this mission was established and supported by the "Domestic and Foreign Missionary Society of the Protestant-Episcopal Church of the United States," they were held entitled to take it.[17] In this case, testimony was received to show the relation of the testator to the society claiming the bequest, and that he intended to benefit that institution.

16. And where a bequest was made to the "American Home-mission Tract Society for our Western Missions," and it appeared there was no society of that name, but that the terms in the will applied in part to two existing societies, the American Tract Society, and the American Home Missionary Society, it was held, that testimony that the testator was acquainted with the objects and operations of the American Tract Society, that their operations were carried on extensively in the Western states, through the agencies of colporters, a species of missionary, and that the testator took a lively interest in the operations of the society, contributed to its funds, and expressed a preference for this society over other charitable institutions, was proper to be considered, in connection with the language of the will, in determining the intention of the testa-

[16] In re The Clergy Society, 2 Kay & J. 615. See also, Bennett *v.* Marshall, id. 740; Goode *v.* Goode, 22 Mo. 518.

* [17] Domestic and Foreign Missionary Society's Appeal, 30 Penn. St. 425.

tor; and that this evidence, in connection with the terms of the bequest, and another portion of the will, where the legatee was described as the above-named Tract Society, thus showing, that the fact of it being a tract society was a prominent idea in the mind of the testator, was considered sufficient to justify the conclusion that the bequest was intended for the American Tract Society. This was considered by the court a case of latent ambiguity.[18]

*17. And where a bequest was made to the Franklin Seminary of Literature and Science, Newmarket, N.H., and there was found to be no other school, or seminary, of learning, or science, in that town, except the South Newmarket Methodist Seminary, that was held entitled to the bequest.[19] And it is here intimated, that the declarations of the testator, showing his intention in regard to the legatee, may be received, if made at the time of making his will, and as part of that transaction, but not if made before or after. But this is questionable. We may here recur to what we have before said, that many of the cases make this distinction, in regard to receiving the declarations of the testator, to define his meaning by the use of particular words. While in many other cases, perhaps the majority, the declarations of the testator are received, when admissible at all, as tending to show his intention, by the use of particular words, — made for many years before the execution of the will, — and in many cases the acts and declarations of the testator must be taken into the account, up to the very termination of his conscious existence. This will depend mainly upon whether the object of such evidence is to fix a purpose, or intention, of the testator, which may change from hour to hour, or to explain his use and understanding of terms, or descriptions, which may be understood, or applied, to different subjects or persons. In the former case, the declarations must have reference to the particular transaction, in explanation of which they are offered; in the latter, all that is required in that respect is, that the declarations were made

[18] Button *v.* American Tract Society et al. 23 Vt. 336. And in the very recent case of Gregory in re, 11 Jur. N. S. 634, where the bequest was to "Francis G. the youngest son of my brother, Francis G.," and there was no son of Francis G. answering the description, the youngest son being named Arthur Charles, and the eldest Arthur Francis; in support of the claim of the youngest son, parol evidence was admitted of a bequest to him, by a prior will, of the same property, and of a general belief, that the testator was his godfather.

[19] Trustees *v.* Peaslee, 15 N. H. 317.

with reference to the terms or phrases attempted to be explained, and in the same relation in which they are used in the will.[20]

18. If the subject intended is certain, and the words apply to but one subject, a superadded description, though false, produces no ambiguity.[21] And in many instances, parol evidence * has been received to help out the construction of a will, where uncertainty occurs in consequence of false description. An instance of this kind occurs, in Thomas *v.* Thomas,[22] where the * devise was to-

[20] Ante, § 39, pl. 7, et seq.

[21] Roman-Catholic Orphan Asylum *v.* Emmons, 3 Bradf. Sur. Rep. 144; Woods *v.* Moore, 4 Sandf. 579; Jackson *v.* Sill, 11 Johns. 201.

* [22] 6 T. R. 671. The judges here seem to agree, that parol evidence of the testator's declarations, in regard to his intentions, as to which of the two persons imperfectly described, should take under the will, might have been received, provided such declarations were made at the time of the execution of the will. This must be upon the ground, that the imperfect description was sufficient to enable the court, provided there had been but one person in any manner answering the description, to have given the devise, either to Mary Thomas, or Elinor Evans; to the first, because she was distinctly named, &c., the wrong description of residence, would be falsa demonstratio, quæ non nocet; and to the last, because, although the name was wrong, the description was sufficient to identify the person, provided there had been no other person more exactly answering the name, and this granddaughter had been the only one who lived at Llechlloyd, in Merthyr parish. Where a devise to "my nephew Robert Nune," was allowed to be given to Robert New, upon proof that Robert New was the testator's nephew, and that he had no such nephew as Robert Nune, goes upon the same principle. In Hampshire *v.* Peirce, 2 Ves. Sen. 216. So also, where the name applies to one person, and a portion of the description, or the whole, to another, it has been held, that evidence of the state of the testator's family, and other circumstances, were admissible to show whether he had mistaken the name of the devisee or not; and upon such evidence being given, it became a question of fact for the jury, whether the mistake was in the name or the description. And it was said, if no such evidence was given at the trial, it would then be a mere question of law, as to the intention of the testator, to be collected only from the will itself. Doe d. Le Chevalier *v.* Huthwaite, 3 B. & Ald. 632; post, § 41, n. 3. And the same principle is recognized in Bradshaw *v.* Bradshaw, 2 Y. & Coll. 72, where a devise to Robert, the *second* son of A. B., was given to *Henry* the second son, *Robert* being the name of the *eldest* son, and the subsequent parts of the will containing devises to the *third*, fourth, &c., sons of A. B., and it being found by the master, as matter of fact, that the devise was intended for Henry, the second son.

It is observable, that a description of the person of a devisee, by means of incidental references in other portions of the will, although properly resorted to for the purpose of helping forward the construction of the will, in order to reach the intention of the testator, is not regarded as of equal force with a description, attached to the name of the devisee, and forming part of the devise. Doe d. * Allen

"Mary Thomas, of Llechlloyd, in Merthyr parish," and it was found that Mary Thomas, who is described in the will as the testator's grand-daughter, was his great grand-daughter, and lived at Greencastle, in the parish of Llangain, some miles from Merthyr parish, where she had never been in her life. The testator had a grand-daughter by the name of Elinor Evans, who, at the date of the will, lived at Llechlloyd, in Merthyr parish. It was considered that, although the will seemed definite enough upon its face, the parol evidence in regard to the state of the subject-matter had created such an uncertainty, that, as it afforded no satisfactory means of explaining it, the devise must be declared void, on that ground. No question is here made, either at the nisi prius trial, where evidence of the testator's declarations, made previous to the execution of the will, were rejected; or at the hearing in banc, but that such declarations made, at the time of the execution, might have been received.[23] And it has subsequently been held, that declarations made before or subsequent to the execution of the will may be received for the same purpose, notwithstanding the doubt here expressed by Lord *Kenyon*.[23]

*19. It has been held, that where the testator was accustomed, before and about the time of making his will, to apply terms used therein, in any unusual sense, parol evidence is admissible to show that fact, in aid of the construction, as where the testator had called any of his family by a sobriquet, or nickname.[24]

v. Allen, 12 Ad. & Ellis, 451. Lord *Denman*, Ch. J., here said, this case, there being two of the same name who answer the words of the devise, "is within the very terms of the only case in which, according to the opinion of the Court of Exchequer, thrown out in their judgment in Hiscocks *v.* Hiscocks, 5 M. & W. 368, 369, declarations of the testator can be received, as evidence of his intention." Lord *Abinger*, C. B., in Hiscocks *v.* Hiscocks, 5 M. & W. 362, seems to regard the case of Thomas *v.* Thomas as being overruled by Miller *v.* Travers, 8 Bing. 244, and we confess, it has always seemed to us that the case is not maintainable upon the doctrine of the recent English decisions.

[23] Doe d. Allen *v.* Allen, 12 Ad. & Ellis, 451. See the opinion of Lord *Abinger*, in Hiscocks *v.* Hiscocks, 5 M. & W. 363. Lord *Abinger* evidently makes a distinction here, between the admission of parol proof, to show the conditiou of the subject-matter, with a view to reach the intention of the testator, by way of construction, and express evidence of the testator's declared intention at the time of making the will. But his lordship does not advert to any distinction, between the declarations of the testator, contemporaneously with the execution of the will, and such as are made before or subsequently. Ante, n. 3.

*[24] Beaumont *v.* Fell, 2 P. Wms. 141; s. c. 1 Eq. Cas. Abr. 152, pl. 14. Many

20. In the case of Beaumont *v.* Fell, just referred to, the legacy was given to Catherine Earnley, and the only person who claimed it was Gertrude Yardley. It appeared, in proof, that at the time of making his will, the testator's voice was very low, and hardly intelligible; that the testator usually called the claimant Gatty which the scrivener might easily mistake for Katy, and that at the time, the scrivener, not well understanding who this legatee was, the testator directed him to J. S. and his wife, who testified, that Gertrude Yardley was the person intended. This was held to be a good legacy to Gertrude Yardley, but it seems to have been decided, upon the ground of some supposed distinction between the degree of certainty required in a devise of land, and a legacy of personalty, which could not now be regarded as of much force, since both are equally required to be in writing. The case is not regarded as of much authority, although very frequently referred to as an illustration. The only ground upon which it seems maintainable is, that there was no claimant besides Gertrude Yardley, and her being called by the pet name of Gatty, might explain why "Catherine" came to be inserted in the will, instead of "Gertrude," and there being no other Gertrude claiming under the will, it was almost a necessary construction, that it should go to the claimant, the same as a devise to *William*, Earl of Pembroke, or Bishop of Salisbury, the true * name of such earl or bishop being John, it is said the Christian name shall be rejected as surplusage, since there can be but one person Earl of Pembroke or Bishop of Salisbury at the same time.[25]

21. In a very late case[26] in Pennsylvania, where the bequest was to "Lavinia, the daughter of my brother John," deceased, and John left no daughter of that name, and a daughter of the testator's cousin claimed the legacy, by the name of Lavinia, and the court decreed it to Cassandra Emig, John's daughter on evidence that the testator mentioned her married name, in connection with the legacy, at the time of making the will, and that both claimants were god-daughters, a class to which he had declared an intention of giving a legacy, the decree was affirmed, on the ground, that, in such an

of these early cases are wholly indefensible upon all the approved rules of construction recognized in modern times. Masters *v.* Masters, 1 P. Wms. 421, where Mrs. Swapper is allowed to take a legacy to "Mrs. Sawyer."

* [25] 2 P. Wms. 142, citing 1 Inst. 3, a; post, § 41, pl. 13.

[26] Wagner's Appeal, 43 Penn. St. 102.

equal balance of circumstances, the presumption was, that the decree carried out the intent of the testator.

22. This case goes, strictly, upon the ground of a latent ambiguity, there being two claimants. In such cases, as we have seen, any degree of latitude in regard to the admissibility of evidence to show the testator's intention, either by his acts or declarations, before, at the time, and after the execution of the instrument, is admissible. But where the will, by mistake, is imperfectly or defectively drawn, the parol evidence is not received to show, directly, the testator's intention, since this is not admissible. It is received to put the court in the place of the testator, at the time of the testamentary act, in order to enable it, if possible, to give such construction to the testator's words, as will effectuate his intention. In the one case, the testimony is received, to show the specific fact of the testator's intention, by extrinsic evidence; in the other, it is received merely in aid of the construction.

23. In a recent English case,[27] where the testator gave his * son, Edward Fleming, a life-estate in a dwelling-house, then in the occupation of his son John, and after the decease of Edward, the same to "descend to my grandson, Henry Fleming, and his heirs." The testator had two grandsons named Henry Fleming, sons respectively of his sons Edward and John, and it was held, that there was a latent ambiguity in the will, in regard to the two grandsons, and that parol evidence was admissible to explain it.

24. In a late Irish case,[28] the testator, by his will, left all his estates to M. F., "now living in France with her uncle M." The fact was, that M. F. had never lived with her uncle M., while C. F. was living with him, at the date of the will, and had been for some time. It was held, that extrinsic evidence was inadmissible to explain the ambiguity in the will; but that the name should control the description, and that M. F. was therefore entitled. And in another case,[29] where the name and description of the legatee was given, which could apply to no other person, it was held, that evidence of the state of the family might be received, but an affidavit of the person who drew the will, to show what had been the cause of the mistake, was held inadmissible.

25. And where the testator, having drawn his will to his entire

[27] Fleming *v.* Fleming, 8 Jur. N. S. 1042.

[28] Plunkett in re, 11 Irish, Ch. 361.

[29] Drake *v.* Drake, 8 Ho. Lds. Cas. 172; S. C. 29 L. J. Ch. 850.

satisfaction, and executed the same in due form, subsequently called upon his solicitor to draw a codicil, for the purpose of altering two bequests contained therein. The attorney, in drawing the codicil, intended to conclude the codicil with a paragraph, "in all other respects, I confirm my said will," but by mistake wrote "revoke" instead of "confirm" and in this state the codicil was executed. It was held, that parol evidence could not be received to correct the mistake.[30]

*SECTION V.

PROOF OF THE TESTATOR'S INTENTION.

1. Indirect evidence of intention received by way of aiding the construction.
n. 2. Selwood *v.* Mildmay considered.
2. and n. 3. Doe d. Le Chevalier *v.* Huthwaite discussed.
3. Sir James Wigram's criticism of certain cases.
4. The case of Door *v.* Geary reviewed.
n. 7. Evans *v.* Tripp explained.
5. The case of Dobson *v.* Waterman approved.
6. The case of Penticost *v.* Ley recognizes the same principle.
7. Direct evidence of intention admissible to remove latent ambiguity.
8. Lord Chency's Case applied in illustration of this point.
9. Counden *v.* Clerke examined and explained.
10. Jones *v.* Newman explained.
n. 12. Several cases bearing on the subject, commented upon.
11. Hampshire *v.* Peirce discussed.
12. Hodgson *v.* Hodgson explained.
13. Beaumont *v.* Fell commented upon and questioned.
n. 14. Same case further discussed, and compared with other cases.
14. Doe d. *v.* Westlake shows that strict equivocation must exist.
15. Cases of misnomer and misdescription.
    a. Great inaccuracies of name, or description, often cured by obvious intent.
    b. Misdescription of corporations cured by intendment.
    c. Entire mistake, both of name and description, fatal to bequest.
    d. Same subject further discussed and illustrated.
    e. Bequest to the son of A, he having more than one, may be treated as a latent ambiguity.
    f. But if the name apply to a person known to the testator, he must take.
16. Bequest to one, his heirs, executors, &c., will lapse, if such person die before the testator.

[30] Davy in re, 5 Jur. N. S. 252; S. C. 1 Swabey & Tr. 262. But a bequest to the testator's "four remaining children," having before named two of his children, will embrace all the four, notwithstanding the testator, in naming the four, omit one of the names. Eddels *v.* Johnson, 1 Giffard, 22; 4 Jur. N. S. 255.

n. 33. Same subject discussed and cases examined.
17. Brett *v.* Rigden, and other cases bearing upon the point, discussed.
18. Express provision that legacy shall be paid to heirs, &c.
19. Must clearly appear the heirs, &c., were intended to take, as purchasers.
20. The rule has prevailed from earliest times. Cases stated.
* 21. Further illustrations of the application of the rule.
n. 43. The same question further discussed.
22. Grounds for admitting parol evidence in this class of cases.
23. The intention of testator cannot be allowed to control the legal import of the words.
24. Parol evidence cannot support the claim of one to whom the words do not apply.
25. All testimony bearing on the construction received.
26. The case of Blundell *v.* Gladstone discussed.
27. Courts go great lengths in transposing the different portions of a will.
28. Evidence often receivable to correct what was an obvious mistake in the will.
29. The case of Careless *v.* Careless discussed at length.
30. Still *v.* Hoste carried this point further than most others.
31. Price *v.* Page seems to have been decided upon the ground that no other person could have been intended.
n. 51. The opinion of the Vice-Chancellor at length.
32. M. S. Case reported by Sir James Wigram, and comments upon it.
33. The admissibility of extrinsic evidence to explain nicknames, pet names, &c.
34. The same subject continued.
35. Will in a foreign language may be translated.
36. Legacy expressed in figures explained by parol.
37. Celebrated case of Goblet *v.* Beechy, as to import of "Mod."
n. 63. The case of Clayton *v.* Lord Nugent, where testator did not name any of the devisees.
38. Kell *v.* Charmer, where sums expressed by cipher, it was held sufficient.
39. Extrinsic documents, as well as facts, may be resorted to for identification.
40. The terms, "appurtenances," "belonging to," and the like, how construed.
41. Sir William Grant's commentary upon the construction of wills.
n. 73. Extract from the opinion of the learned judge.
42. Sir James Wigram's fifth proposition.
43. Parol evidence not admissible to correct mistake in will.
44. Distinction between explaining an act wholly in parol, and where it is partly in writing.
45. Parol evidence received to rebut resulting trust under will.
46. Executors may thus rebut the implications in favor of the next of kin.
47. So also to show whether legacies are double, or single, &c.
48. May be received both to rebut and to confirm the legal presumption.
49. But not to create a presumption not raised by law.
50. To show an intention to adeem a legacy or portion. Also, testator's declarations.
51. Mr. Jarman's definition of the rule excluding extrinsic evidence of intention.
52. Sir James Wigram's proposition upon the same subject.
53. Discussion of some cases under this head. Doe d. Brown *v.* Brown.
54. Doe d. Oxenden *v.* Chichester commented upon.
55. Mr. Jarman's and Sir James Wigram's views on this question. The principle further discussed.
* 56. Exposition of the question, by the judges, in Anstee *v.* Nelms.
57. Review of Sir James Wigram's criticism of the opinions of the judges in the cases last named.

58. The two classes of cases seem identical in principle.
59. A bequest to children cannot be shown to have been intended for natural offspring.
60. This rule often leads to anomalous results.
61. The rule further discussed and illustrated.
62. The rule applies to a general devise of real estate, but not of personalty.
63. Where there are persons answering the words, their primary signification cannot be extended by parol.
64. There must be something in the will to enable the court to give meaning to relative terms.
65 and note. The commentary of Mr. Wigram upon this point.
66. Some American cases referred to upon the question.
67. Case illustrating the subject, decided by Sir John Leach.
68. Recent cases, illustrating the strict adherence of the English courts to established rules of construction.
69. The intent must be gathered from words of will, but may be construed in connection with writing referred to in the will.
70. Construction influenced by extrinsic facts in the mind of the testator.
71. The introductory words of will cannot enlarge devise except they are connected with it.
72. Paper ambiguous must depend upon legal construction.
73. Parol evidence not admissible upon the question of such construction.
74. If the words of the will apply to existing facts, parol evidence cannot vary it.

§ 41. As the statutes in most of the American states require that wills be in writing, it is obvious, as a general rule, that extrinsic evidence cannot be received, either to explain, or vary, the written instrument. And the rule, to be of any practical use, must be inflexibly adhered to, even where it becomes obvious, that in so doing, the court defeat the purpose of the testator. But, like all rules, this also has its exceptions.

As has been said by one of the most lucid writers in the English common law, upon the subject of admitting extrinsic evidence to aid in the interpretation of writings, "notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by the material facts in the case, are insufficient to determine the testator's meaning, courts of * law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.[1]

The conclusion to which this writer comes is much the same which we have already intimated; that the words of the will must be "applicable, indifferently, to more than one person or thing," in order to admit direct evidence of the intention of the testator,

*[1] Sir James Wigram's Extrinsic Evidence, (101), 109.

as to which person or thing he did mean. We shall now proceed to examine and review some of the cases bearing upon this most important practical question, with a view to extract, if possible, the precise rules now prevailing in the courts of England and America in regard to it.

1. There is a class of cases where indirect evidence of intention has been received to aid the construction of the will, when nothing of latent ambiguity, in the strict sense of that term, exists, but where, in fact, the words of the will had but an imperfect application to any person, or subject-matter, as the case might be.[2] In

[2] Selwood *v.* Mildmay, 3 Vesey, 306. The testator here gave a sum, part of his £4 per cent. bank annuities. It appeared that he had no such property, at the date of the will, having previously invested it in long annuities. But all through the will, these £4 per cent. annuities were referred to, as existing funds, belonging to the testator, when, in fact, he had no such at the date of the will, or any time thereafter. The scrivener deposed, that the testator gave him, as part of his instructions in regard to drawing the will, a former will, wherein he had given sundry legacies payable in £4 per cent. stocks, and he, not being informed of their investment in long annuities, thus made the mistake, in the will, above stated. The court was of opinion, that upon this evidence the mistake might be corrected, and decided accordingly. This case is regarded in Miller *v.* Travers, 8 Bing. 244, as coming within the maxim, falsa demonstratio non nocet. It is obvious that the purpose of the testator in giving his wife, during her life, the income of £1,250, "part of my stock in the £4 per cent. annuities in the Bank of England," was to give her the use of £1,250, in his stocks; and as his personal estate, at the time of his decease, consisted only of some long annuities, household furniture, and leaseholds, specifically bequeathed, it became very clear that it must have been the purpose of the testator that the bequest should operate upon such annuities, else it could not operate at all. Hence we conceive that Sir James Wigram's criticism, Wigram's Extrinsic Evidence, 103, is not entirely just. The decision seems to us to violate no principle. But it is very obvious, that the evidence of the scrivener could not fairly be allowed to have any bearing upon the construction of the instrument. The language used, as applied to the condition of the testator's property, showed very clearly, that the legacy must be taken out of the long annuities, since there was no other fund from which it could come. And it is not unusual, in the construction of testamentary gifts, specified to come out of a particular fund, which either does not exist, or becomes lessened in value, or for other cause is inadequate to pay such bequests, to supply the deficiency out of the general funds of the estate. That is the general rule in regard to demonstrative legacies, to which class this evidently belonged. This is the view adopted by *Tindal*, Ch. J., in Miller *v.* Travers, 8 Bing. 244. "The case is certainly," says the learned judge, "a very strong one, but the decision appears to us to range itself under the head, that 'falsa demonstratio non nocet,' where enough appears upon the will itself to shew the intention, after the false description is rejected." And in Hiscocks *v.* Hiscocks, 5 M. & W. 363, this case is referred to, as

this case, the parol evidence of the mode in * which the mistake occurred, was received by the court. But the case was really decided upon other grounds. As we have said, the only legitimate evidence in this case, which was properly receivable, and fairly entitled to have any just bearing upon the legal import and effect of the instrument, was that which showed the state of the testator's property, and which was intended to place the court, as nearly as practicable, in the position of the testator, at the time of using the language in question.

*2. The case of Doe d. Le Chevalier *v.* Huthwaite,[3] is much of

being entirely sound, in the view taken by the Master of the Rolls, "as one analogous to that of the devise of all the testator's freehold houses, in a given place, where the testator had only leasehold houses." The case seems to us, if we reject the parol evidence of the mode in which the mistake occurred, and place it upon the mere ground of the construction of the will, as aided by the consideration of the state of the testator's property at the time of his decease, altogether unquestionable. In Wigram, 167, it is said, that this case, as explained in Miller *v.* Travers, supra, may be regarded as a case decided upon a correct principle wrongly applied to the facts, and "which ought not to be followed in specie." See also, Hiscocks *v.* Hiscocks, 5 M. & W. 362.

*[3] 3 B. & Ald. 632; s. c. 8 Taunt. 306. This case first came up in the Common Pleas, upon a verdict for plaintiffs taken at the Assizes. It was argued by Serjeant Copley, the late Lord *Lyndhurst*, for the devisee, and the court gave judgment upon the verdict for defendants. The case was then turned into a special verdict, and removed into the King's Bench on writ of error, and there argued by Sir *Lancelot Shadwell*, and Lord *Denman*, while those gentlemen were at the bar, and a venire de novo awarded by the court, after an adv. vult, upon the ground that it was proper to inquire by the jury whether the mistake was in the name of the devisee or in the description. And the Lord Chief Justice here said: "If no such evidence is given at the trial, it would then be a mere question of law, as to the intention of the testator, to be collected only from the will itself; upon which the judge must direct the jury, and it would be open to either party to tender a bill of exceptions." The case seems to have been decided by the parol evidence given at the trial, as it did not come up again. It would seem, that upon general principles, the name should have prevailed, and the false addition or description have been rejected, upon the maxim, falsa demonstratio non nocet. It is far more probable that the testator might, for the moment, stumble in regard to whether certain persons, by name, were the second or third sons of their father, than that he would mistake the name. And it is now perfectly well settled, that if the words of the will, with reference to the subject-matter, are susceptible of a clear and definite import, that will prevail, and the intention to have the will operate differently, expressed by the testator at the time of the execution of the same, cannot be received to control the words used. Tucker *v.* Seaman's Aid Society, 7 Met. 188, where the cases are extensively examined, and the principles discussed by *Shaw*, Ch. J. This being an important case, the subject was very thoroughly considered,

the same character as the one last alluded to. The testator * devised the estate to Stokeham Huthwaite, *second* son of John Huthwaite, for life, with the remainder to his first and other sons and daughters in strict settlement; and in default of such issue, to John Huthwaite, *third* son of the above-named John Huthwaite, for life," &c. In fact, Stokeham Huthwaite was third son of John Huthwaite, and John, the devisee in remainder, was the second son. The court was of opinion that evidence of the state of the testator's family might be received, and upon such evidence it might be determined by the jury, whether the testator "had made a mistake in the name of the devisee or not." In other words, that it might be referred to the jury to determine, whether the mistake was in the name of the devisee, or the description.

3. Sir James Wigram refers to Door *v.* Geary,[4] Dobson *v.* Waterman,[5] Penticost *v.* Ley,[6] and Evans *v.* Tripp,[7] "as cases * respecting which it is (at least) doubtful, whether they can be explained upon strict principles of exposition."

and it was ultimately decided contrary to the acknowledged intent of the testator, as appeared from the extrinsic evidence, on the ground that although "the intent of the testator is to govern in the construction, it is the intention expressed by the will," and not the actual intent, as shown by extraneous circumstances and proof. Here the testator intended the bequest for a society in New York, called "The Seaman's Friend Society," but the scrivener inserted the name of "The Seaman's Aid Society in the city of Boston," both he and the testator, at the time, supposing that was the name of the society intended by the testator. The mistake occurred in consequence of incorrect information, given the testator by the scrivener, through his imperfect knowledge upon the subject. And * although the mistake was clearly proved, and there remained no question of the real intent of the testator, the court very justly held, that the will, as written, must prevail, and that no mistake in drawing it up could be corrected, either by construction or by extrinsic evidence.

If there had been but one society, and in attempting to describe that some departure from the name had occurred, it might have been corrected by construction, since there was nothing else to answer the words of the will. But the case is otherwise where another person's name than the one intended is inserted in the will. That cannot be set right, but must prevail, the force of the written instrument being of paramount weight. Ante, § 40, pl. 15, 16, n. 3. The case of Powell *v.* Biddle, 2 Dallas, 70, where it is held, that a bequest to a person, correctly described in the will, may be given to another, not so described, upon proof that such was the intention of the testator, is here declared to be of no authority, by *Shaw*, Ch. J., and upon the most unquestionable grounds.

[4] 1 Ves. Sen. 255.

[5] 3 Vesey, 308 and n.

[6] 2 Jac. & W. 207.

[7] 6 Mad. 91. In this case the testator gave the sum of £5,000 three per cent Con-

4. In Door *v.* Geary, the testator bound himself, upon his marriage, to leave his wife £500. He left her nothing absolutely (being only the interest of his personal estate during her widowhood), except £700 "East-India stock." He had no East-India stock, but £700 bank-stock. It was held by Lord *Hardwicke*, that it was so apparent, that the testator must have had reference to the bank-stock, being the only property to which the bequest could be referred, and unless it were referred to that, it must be presumed that the testator purposely used words without meaning, and also intended to evade his obligation assumed at the time of his marriage, that the bequest * should be upheld and applied to the bank-stock. We are not prepared to say the case is not correctly decided. And it is clear, we think, that parol evidence was properly received to show both the state of testator's property, and the duty which he owed to the legatee, the same as a legatee, whose name only is given, may be shown to have sustained a particular relation to the testator, for the purpose of identification by construction.

sols standing in his name. And it being suggested, that he had no such stock, it was referred by the Vice-Chancellor to the Master to find whether the testator had any such stock, or any other which he intended to have pass, who reported that he had not any such stock at the time of making his will, but that * he intended to buy some, which he never did. The court held, that nothing passed by the gift. The Vice-Chancellor said: "A gift of my gray horse will pass a black horse, if it be found to have been the testator's intention that it should pass by that description but if the testator has no horse, the executor is not to buy a gray horse."

It was objected, in this case, that it could not be referred to the Master to find what was the testator's intention, but only to find what stock he had. The Vice-Chancellor thought otherwise, because other circumstances might indicate his intention to have other stock pass, and likened it to "the case of a misdescription of the legatee, where the court always sends it to the master to *inquire who was intended.*" It is plain here, that the intimation of the court goes beyond the law. It could not be referred to the master or to a jury, in a case of this kind, to find, from general extrinsic evidence, what was the intention of the testator. And although something of this kind is intimated in Doe d. *v.* Huthwaite, ante, pl. 2, it is manifest it must be received with considerable qualification. Beyond such facts or circumstances, in regard to the condition of the testator and his family, as are requisite to place the court in the condition of the testator, we are not aware that any evidence can be received, in cases of merely defective, or imperfect, or contradictory description of the subject-matter of a bequest, or of the legatee, to show, directly, what was the intention of the testator. So far as any of the cases above referred to by Sir James Wigram, have admitted direct evidence of the purpose and intention of the testator, they are no doubt fairly obnoxious to the criticism of the learned writer.

5. The case of Dobson *v.* Waterman, seems to have carried the same principle still further. The will contained a bequest of £700 "capital stock in the three per cent consolidated Bank Annuities," referring to them as standing in the testator's name in the Bank of England. The testator had not, at the date of the will, or at the time of his decease, any stock whatever at the Bank. But he had £1,500 three per cent South-Sea Annuities. Lord *Kenyon*, as Master of the Rolls, after referring the case to a master, and obtaining his report, to the effect that the testator possessed no property answering the description in the will, except the South-Sea Annuities, held: "That the state of the testator's property made it manifest, that he was under a mistake as to the particular stock belonging to him, but whatever stock it was, he certainly intended to give the sum of £700 to the plaintiff." It seems to us, that this case was well decided, far better than to have held the bequest void for uncertainty.

6. And Penticost *v.* Ley seems to have been decided, so late as 1820, upon the authority of Dobson *v.* Waterman, which was decided in 1787. That case was, that of a bequest of £1,000, long annuities, "now standing in my name, or in trust for me." At the date of the will, the testatrix had no long annuities, but had £1,000 three per cent reduced annuities, and it was held, that it passed by the will. The Chief Baron, sitting for the Master of the Rolls, said, in giving judgment: "It being clear, that she intended to give something, we must try, as well as we can, to make out what it was. Now she had, at the date * of the will, a sum of £1,000 three per cent reduced annuities; and having nothing to answer the description so nearly as that sum, and it being clearly a mistake, it seems to me, that we are obliged to consider, that when she said £1,000 'long annuities,' she meant this £1,000 reduced annuities." It was here considered, that the case was ruled by Dobson *v.* Waterman, and Door *v.* Geary, and such is undoubtedly the fact.

7. There certainly exist a very large number of cases, in which direct evidence of intention, extraneous from the will, and from all construction of the will, has been received to remove a latent ambiguity. Some of these have already been referred to, and it may be well to review the cases bearing upon this point.

8. In Cheney's Case,[8] which occurred in 1591, the bequest must

[8] 5 Co. Rep. 68 b.

clearly have failed, as in all similar cases, but for the extrinsic evidence, since the devise was to my son John, and the testator had two sons living of that name. It is always supposable, as in all analogous cases, that the testator either did not know, or did not remember, that the two sons were still living, which proved to be the fact, and proof of this misapprehension of the testator removed the ambiguity, without the absolute necessity of resorting to direct evidence of intention. And this class of evidence is that which is more commonly found to remove latent ambiguities; since, in the majority of such cases, the testator will not be aware of the existence of any extraneous facts whereby the will is rendered uncertain, and therefore he will not be presumed to have made any declaration of his intention in regard to the matter, as between the two or more uncertain objects or persons. And the doubt has to be removed by various kinds of indirect circumstances, which tend with more or less certainty toward that result. But in the case last referred to, it appeared the testator did name his son John, the younger *at the time of giving directions for preparing his will,[9] and this was held admissible to remove the ambiguity.

9. In another very early case,[10] it is said, that the intention of the testator must prevail, but "that such intent must be expressed in the will written, that it may be certain to the court and not against law," and "if I devise lands to my son John, having two of that name, averment who was meant shall make this certain."

10. In another case,[11] where land was devised to John Cluer, there being two, father and son, of that name, the judge, at the

[9] 1 Jarman on Wills, Eng. ed. 1861, 401, 402. "For, observes Lord Coke, no inconvenience can arise, if an averment in such case be taken, because he who sees such case ought, at his peril, to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent."

In Bate *v.* Amherst, Sir T. Raym. 82, the testator gave all his land in Kent and Sussex to "one of my cousin Nicholas Amherst's daughters, that shall marry with a Norton within fifteen years." A question was made, in regard to the contingency of the devise. But the court held, that it was not to be presumed, that more than one of the three daughters would marry a Norton, and if that should occur, the estate would have vested upon the marriage of the first, and would not be divested by another doing the same. The early cases, in regard to the construction of wills, are here reviewed by *Bridgman*, Ch. J. C. B., and although not of much authority, will repay an examination in the brief manner here presented.

[10] Counden *v.* Clerke, Hob. 29, 32 (1613).

[11] Jones *v.* Newman, 1 Wm. Blackstone, 60 (1750).

trial, rejected parol evidence offered to show that the testatrix intended to leave it to the son, and on motion for a new trial, it was held, by the whole court, that the judge was mistaken.

11. In a case [12] before Sir *John Strange*, at the Rolls, in the

[12] Hampshire *v.* Peirce, 2 Ves. Sen. 216 (1750). Sir *John Strange* here cites a case, where a bequest was made to "my nephew, Robert Nune," and it appearing that the testator had no nephew of the name of Nune, but one of the name of Robert New, it was held the latter was entitled to the bequest. But, said the learned judge, "it would hardly have done, if it had not been for the * relative words *my nephew*," thus clearly recognizing the rule, that the case was decided, as matter of construction, and not upon the parol evidence of intention. This was clearly just, since there was no case of equivocation, where the words of the will applied indifferently, or with legal certainty, to two subjects or persons. The question here was, to know whether the words applied, with legal certainty, to one person. In such cases, the most aid which can be derived from extrinsic evidence is to place the court in the precise position of the testator, and thus enable them to find out his meaning by construction.

But the cases are almost innumerable where it has been held, that parol evidence of the mistake of the scrivener, and that the testator executed the will under the apprehension that it was differently written, cannot he received either to vary or defeat the will. Rosborough *v.* Hemphill, 5 Rich. Eq. 95; Gaither *v.* Gaither, 3 Md. Ch. Decisions, 158; Harrison *v.* Morton, 2 Swan, 461.

Nor can parol evidence be received, as before stated, to show in what sense the testator used certain well-understood terms of law. Aspden's Estate, 2 Wallace, Jr. 368.

Nor can extrinsic evidence be received, as we have seen, to defeat a legal construction, as that the testator by the word "children," intended to include illegitimate children, it being well settled in law, that the term cannot have that construction, unless that be indispensable in order to give it any legal operation. But it has been held, that where certain illegitimate children had, at the date of the will, acquired the reputation of being, and were recognized by the testator as, his children, they might take under the general term children. Ferguson *v.* Mason, 2 Sneed, 618.

But this is probably going further than the English decisions would allow. In the late case of Edmunds *v.* Fessey, 7 Jur. N. S. 282 (Feb. 1861), occurred a most remarkable illustration of the pertinacity of the adherence of the English courts to the established legal construction of words. The testator gave £100 "to each of the sons and daughters of A. B. living at my death." At the death of the testator, there were living three sons and one daughter of A. B.; one of the sons and the daughter were illegitimate. Held, that the illegitimate daughter took the legacy, but that the illegitimate son was excluded. Sir *John Romilly*, M. R., said: "I regret the decision to which I feel myself obliged to come, because it is evident the testator intended to include all the children — whether legitimate or illegitimate." But as there were two legitimate sons answering the words of the will in that respect fully, the illegitimate son could not he * included, without shaking the "authorities;" and the illegitimate daughter took because there was no other per-

* time of Lord *Hardwicke*, the rules of the admission of extrinsic evidence seem to be held very loosely. The marginal note is, * "parol evidence admitted to explain a will where doubtful, not to contradict." And the Master of the Rolls seems to have entertained that opinion at the trial, and evidence was accordingly received of the instructions sent to the scrivener, the bequest being to four children of E. B., she having six, four by one husband and two by another, which fact, and the additional circumstance, that the two children were already abundantly provided for by the husband, made it reasonably certain, as matter of construction, that the will must apply to the "brood of four," as the learned judge expressed it. In this same will there was another legacy to the children of E. B., and the court held, very justly, that it must go to all the children, and that parol evidence could not be received to show any other intent in the testator.

12. There is an early case,[13] where land was devised subject to the payment of £100 the testator owed to one *Shaw*. It was proved that the money was not due to Shaw, but to one Alice Beck, and the devisee of the land refused to pay the £100. * The bill was brought to compel the payment, and the Lord Chancellor said, "he saw no hurt in admitting of collateral proof to make certain the person, or the thing, described." This case rests upon peculiar grounds, and seems, like some others, to have been well decided, but poorly reasoned, in the judgment. The devisee evidently took the land subject to the payment of £100, for the benefit of the estate. The parol evidence then went to create no new liability,

son coming so near the words of the will, and in order to give that part of the will some operation.

It is perhaps fair to say, that this case exhibits a degree of strictness, in adherence to legal constructions, which may justly appear to the unprofessional mind more nice than wise, and which cannot be approved, if there is any fair mode of escaping it.

The American courts have not commonly adopted any such extreme constructions. But it has been held even here, that where the words of the will are insufficient to carry real estate, it is not competent to show, from the condition of the testator's property, or his own memoranda and declarations, that he must have so intended. Allen's Exr's *v.* Allen, 18 How. U. S. 385. But in Bailey *v.* Patterson, 3 Rich. Eq. 156, it seems to have been considered, that extrinsic evidence might be resorted to, for the purpose of showing, that the testator used the word "heirs," not according to its strict, legal import, but in a more extended sense, as synonymous with children. But such a rule is clearly inadmissible.

[13] Hodgson *v.* Hodgson, 2 Vernon, 593 (1707).

but only to define the person to whom the payment should be made of a debt already existing. It was evidently a question wholly collateral to the effect of the will, and the money might have been decreed to the executor, leaving him to apply it.

13. There is another case[14] of a very peculiar character, often cited, and generally approved, but which seems to us rather questionable in the extent to which extrinsic evidence was received to correct an evident mistake in the scrivener. We have stated this case before.[15] The scrivener, by some means, evidently got both the Christian and surnames of the legatee wrong, and the Master of the Rolls, at the hearing, inclined to the opinion "that the legacy was void," but finally sustained it. And the very terms in which the opinion is announced by the reporter, * would satisfy any one that the legacy was awarded to the claimant, altogether upon the extrinsic evidence, and the additional circumstance that no person could be found answering the name used in the will. His honor gave his opinion, that the legacy was a good legacy to Gertrude Yardley, *though the same was given by the will to Catherine Earnley*. This seems a full admission that the legacy was not given, *by the will*, to the claimant. Could it make any difference then, that it was given, by mistake, to some unknown person, or to nobody, so far as the court could ascertain. It is scarcely supposable that such mistakes are to be corrected in that mode, without opening a door to supply every defect in wills, by parol. We think the case is radically unsound. In Mostyn *v.* Mostyn,[16] Lord *Brougham*, Chancellor, said: "I take Beaumont *v.* Fell no

* [14] Beaumont *v.* Fell, 2 P. Wms. 141. Mr. Jarman says, Eng. ed. 1861, vol 1, p. 413: "We should pause, therefore, in acting on Beaumont *v.* Fell, as an authority, beyond its peculiar circumstances, unsupported as it is by any subsequent decision, admitting evidence to ascertain both the Christian and sur name, without the aid of any additional description. The case seems to have been generally considered as decided on the circumstance of the nickname, but even with regard to this, the variation was not inconsiderable." It is obvious the case goes a great deal further than that reported by Sir *John Strange*, in Hampshire *v.* Peirce, supra, which, it is there said, would be unsound, except for the aid derived from the description of the person as "my nephew." But in this case, the Christian name Robert was correct, and New for "Nune" is much less variation than Yardley for "Earnley," with "Catherine" for Gertrude, and no aid from description. It was a case, clearly, where the court made the will, and the law.

[15] Ante, § 40, pl. 20.

* [16] 5 Ho. Lds. Cas. 168.

longer to be law. I take it to have been overruled in Miller *v.* Travers.[17] But the case of Beaumont *v.* Fell is not, in terms, alluded to in the opinion of the learned judges in Miller *v.* Travers, as delivered by *Tindal*, Ch. J. But it is very obvious, that the views there maintained will scarcely stand well with the case of Beaumont *v.* Fell. And Lord *Abinger*, in Hiscocks *v.* Hiscocks, supra, says: "But these cases," Beaumont *v.* Fell and Thomas *v.* Thomas, "seem to us at variance with the decision in Miller *v.* Travers, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, the testator meant the county of Clare."

14. The case of Doe d. Westlake *v.* Westlake[18] illustrates the rule excluding extrinsic evidence, where a will does not apply with equal clearness to different persons or subjects, and still would apply with legal certainty to either, had it not been for *the existence of the other. Here the testator devised an estate to Matthew W. his brother, and Simon W. his brother's son, jointly in fee-simple. It appeared that the testator had three brothers, each of whom had a son, Simon, living at the decease of the testator. It is manifest, if there had been but one brother's son named Simon, he must have been held entitled, as sufficiently answering the words of the will. But here the court held, and justly, we think, that, as matter of construction, it must be considered that the testator had reference to the son of his brother Matthew, whom he then had in mind, and for whom he was then making provision. The language of the will, therefore, "Matthew my brother, and Simon, my brother's son," must be understood as importing the same brother. And the jury, whose instincts are generally in the right direction, in regard to such questions, so decided at the trial, notwithstanding the judge received evidence of the testator's declarations, that he had intended to bequeath his property to Simon, the son of Richard; and the court refused to rule for a new trial, upon the grounds already stated, and that, consequently, no case of latent ambiguity was presented.

15. There is a great number of cases in regard to misnomer, and

[17] 8 Bing. 239.

[18] 4 B. & Ald. 57.

misdescription, of persons, or things, in wills, which may be considered here. It will not be possible to reconcile all the cases, perhaps, upon any hypothesis which we can present. The most we can hope will be, to extract some principle from them which will enable us to declare the existing rule of law upon the subject.

a. It is never required that all the particulars of name, or description, of person, or thing, should be precisely accurate, in order to the validity of the provisions of the will. It is always sufficient, that the court, after learning the surrounding facts and circumstances, should be able, with reasonable certainty, to declare the intent of the testator.[19] And where a false, or * inapplicable description, is annexed to a subject, it is to be rejected, as we have seen, if that will render the matter certain, and leave no question of the intent of the testator.[20] As where a house is named, as being in the occupation of a particular person, and he was not in possession, this part of the description is rejected. And where part of the premises only are in the occupation of the person named, the whole will pass.[21] And it often happens that in a description, so many particulars are enumerated, that one mistaken, or erroneous one, raises no doubt whatever. As where the testator gave his lands in Bramstead, in the county of *Surrey*, and he had no lands in *Surrey*, but he had lands in Bramstead, in the county of Hampshire, and it was held, that these lands would pass by the devise.[22] It is familiar law, that a misdescription of the extent of the testator's interest in the property will not affect the bequest, if there is a clear purpose expressed that particular property shall pass under the will.[23]

[*19] 1 Jarman, 348; Howard *v.* Conway, 1 Coll. 87; Stephens *v.* Powys, 1 De G. & J. 24.

[*20] Mann *v.* Mann, 14 Johns. 1; Blague *v.* Gold, Cro. Car. 447; s. c. 473. See also, Thornton *v.* Tompson, And. 188; 2 Leon. 120.

[21] Chamberlaine *v.* Turner, Cro. Car. 129. The expression here was, "the house wherein W. T. dwelleth," and it proved that he dwelt in some of the rooms, and other persons occupied other portions of the house and garden.

[22] Hastead *v.* Searle, 1 Ld. Ray. 728. See also, 1 Jarman, 348; Owens *v.* Bean, Finch, 395; Brown *v.* Longley, 2 Eq. Cas. Ab. 416, pl. 14. Lands described as in the parish of Billing, in Brook street, will pass, although the testator have no lands in that parish, these lands being in Billing street. 8 Vin. Ab. 277, pl. 7; Brownl. 131.

[23] Denn d. Wilkins *v.* Kemeys, 9 East, 366, where it is said, it seems that *freehold* may pass by a will giving the estate a local description and name, though it be mistakenly called *leasehold*, there being no other property answering to

*b. The courts have gone great lengths, in many cases, in supplying, by intendment, defects in the description of corporations, in wills, both where some particulars of the corporate name were omitted, and where terms were introduced not in the corporate name.[24] And where a legacy was given to the Provost and Fellows of Queen's College,[25] and the corporate name of the college was the Provost and *Scholars*, it was held, by the Vice-Chancellor, "as in common parlance, the name of Provost and Fellows is used, instead of the proper corporate name of the college," and this bequest was for the benefit of the library, and as the library is held by the corporate body, that body must have been intended to take. And where the description was imperfect, but it was called the "Westminster Hospital Charing Cross," the Charing-Cross Hospital was held entitled, as being nearest the locality mentioned, and as being a general hospital, the testator, when he intended to give to a hospital of a special character, having so named it.[26]

c. But where the name is wholly mistaken, although the name and description, in connection with surrounding circumstances, render the identity of the person, or thing, reasonably clear, the court cannot undertake to foist a new provision into the will. *As

the name and description. And in Day *v.* Trigg, 1 P. Wms. 286, it is said, if one devises all his freehold houses to A, and hath none but leasehold houses there, the leasehold shall pass. It is intimated here, that the same rule of construction might not be applied to a grant. But the rules of construction of deeds and wills have become much the same, and especially in the American courts. It is in both cases a question of intention, to be reached by construction. And if there is enough in the instrument to form the basis of the construction, it may be effected in that mode, both in deeds and wills, otherwise the instrument * fails for uncertainty, there being, as is said in regard to the statute of jeofails, nothing to amend by.

[24] Atty.-General *v.* Corporation of Rye, 1 J. B. Moore, 267; s. c. 7 Taunt. 546; Foster *v.* Walter, Cro. Eliz. 106. But see Atty.-General *v.* Sibthorp, 2 Russ. & My. 107. In Dexter *v.* Gardner, 7 Allen, 243, considerable latitude of construction was adopted, in order to reach the identity of the devisees obviously intended.

[25] Provost and Scholars of Queen's College Oxford, *v.* Sutton, 12 Simons, 521.

[26] Bradshaw *v.* Thompson, 2 Y. & C. C. C. 295. See also, Wilson *v.* Squire, 1 id. 654; Smith *v.* Ruger, 5 Jur. N. S. 905. In Wilson *v.* Squire, the devise was to the "London Orphan Society, in the City Road," and the only society in that locality approaching this name, was the Orphan Working School. Testimony was given to show that there was a society at Clapton, called the London Orphan Asylum, but the court held, that the Orphan Working School was sufficiently described, and, therefore, the testimony was not receivable, although it went the extent of showing, that testator had been a subscriber to the London Orphan Asylum, and had expressed a purpose of leaving a legacy to it.

where the devisee was described as "James, son of Thomas Andrews of Eastcheap, printer," and there was no person of that name in Eastcheap, but there was a printer living there of the name of James Andrews, who had a son named Thomas, who was related to the testator, and a son named James, not related to him, having different mothers. The son named Thomas claimed the legacy, on the ground that the will was intended to read "Thomas, son of James Andrews." But the court held, that such latitude of construction was beyond all precedent, and declared the legacy void.[27]

d. And in another case, the will made provision for testator's two sisters, Reyne and Estrella, and in case of the decease of either, their issue to have their respective shares. It appeared that Reyne had changed her religion from that of a Jew, and become a Roman Catholic, and a nun, and had been baptized by the name of Maria Hieronyma, and lived at Genoa. Estrella and Rebecca were married and lived at Leghorn, and Rebecca had several children, who brought the bill against the trustees, claiming on the ground that the testator meant Rebecca, when he named Reyne. One witness swore that the testator said, when he made the will, that he was providing for his sisters, at Leghorn. Lord Chancellor *Thurlow* regarded the name of baptism,[28] * although adopted nearly twenty years before the date of the will, as merely a conventual name, and part of the profession and separation from the world, and as entering into the policy of the thing, and that the "name of confirmation by the law of the country is the real name," and rejected the evidence and dismissed the bill.

e. In a case cited here,[29] Lord *Thurlow* gives some qualifica-

[27] Andrews *v.* Dobson, 1 Cox, 425.

[28] Delmare *v.* Robello, 1 Ves. Jr. 412. There can be no question of the entire soundness of this decision. But there are some inaccuracies in the opinion, not entirely in character with Lord *Thurlow*. The name is given in baptism, and not in "confirmation." Strictly speaking, there is no name of confirmation. Hence the argument, although entirely sound, as to the distinction between the conventual name of a nun, and her common name, and the probability that her family would know her only by her former name, is unfortunately confused, for a good churchman, as we presume his lordship to have been; notwithstanding his occasional violation of one command in the decalogue, for keeping which he constantly prayed for grace, and as constantly violated, to his great discredit, both as a judge and a Christian. The distinction is evidently between the name of reputation, and that of baptism.

* [29] Dowsett *v.* Sweet, Ambler, 175, before Lord *Hardwicke*. So a devise to William P., eldest son of C. P., was held sufficient to point out the person, although

tion, which seems unquestionably sound. The devise was to the son and daughter of W. W., and there being four sons living at the time, his lordship held that none of them should take, on account of the uncertainty, which was intended. This would no doubt be the result, where no evidence appeared to show the intent of the testator. But as Lord *Thurlow* here said, this is clearly a case of latent ambiguity, arising from the extrinsic fact of there being more than one son. The principle of the uncertainty is precisely the same, as if the devise had been to a person by name, and it had been shown there was more than one person answering to the name. In this same case, there was another devise to John and Benedict, sons of John Sweet. John Sweet had two sons named *James* and Benedict, and no son John, and it was held that James should take.

f. But where the name is found to answer to any person known to the testator, courts will not admit evidence to show that it was inserted by mistake for some other name, although some portion of the description used would more strictly apply to the other person than to the one named.[30]

*16. And in every case, where the testator makes a gift to a person, his executors, administrators, heirs and assigns, or any equivalent expressions, showing the intention to have the gift, or devise, transmissible, and such person is not living at the decease of the testator, the legacy becomes lapsed, as we shall see hereafter, the possibility of transmission being cut off by the prior decease of the person named. And it will make no difference, that the person was not living at the time of making the will, and this was

the name of the person was Andrew, and not William. Pitcairne *v.* Brase, Finch, 403. See also, Gynes *v.* Kemsley, 1 Freem. 293; River's Case, 1 Atk. 410. In this last case, the true rule is declared, that if a person's name be mistaken in a devise, yet if the person is so described, that with reference to extraneous facts, the description clearly identifies the person meant, the devise to him is good. But in a very recent case before Vice-Chancellor *Wood*, Matthews *v.* Foulshaw, 11 Law T., N. S. 82, where a devise was made by the testator to the two children of his son Joseph, — Joseph, at the date of the will, having four children, two by his present and two by a former wife, — evidence was not received to show that the testator intended the two by the former marriage, and it was held that all the children must be admitted to an equal participation in the bequest. But the case can scarcely be regarded as of much weight, although decided by an eminent equity judge.

[30] Holmes *v.* Custance, 12 Vesey, 279; ante, pl. 2, n. 3.

known to the testator. The probable intention of the testator, thereby proved, to have the bequest take effect in the personal representatives of the person named, will not overcome the established rule of construction, that the words heirs, executors, and administrators, are to be regarded as words of limitation, and not words of purchase, unless an intention to the contrary is clearly expressed.[31] We shall present a brief synopsis of the cases bearing upon this question, in this place, as illustrative of the strict adherence of the courts to the established rules for the constructions of words, and their extreme reluctance to control that construction, by resort to extrinsic evidence, notwithstanding the discussion here may be somewhat out of the order which we had prescribed for ourselves. There are many strong cases of evident intention not to have the legacy lapse, where nevertheless the courts have * held, that such was the legal result. In Elliot *v.* Davenport,[32] the testatrix gave £400 to one of her debtors, being a debt he owed her, on condition he paid certain sums named, to the testatrix children, amounting to £150 in all. The legatee died during the lifetime of the testatrix. The Court of Chancery decreed this to be a lapsed legacy, notwithstanding the testatrix expressly directed her executor not to claim any part of the debt, and to give such a release of it, as the debtor, his executors, administrators, or assigns might desire. There seems here to be a very clear indication of the purpose of the testatrix, that the legacy should not lapse. And the reporter adds a note, that the Master of the Rolls, "was of another opinion, and

* [31] Maybank *v.* Brooks, 1 Br. C. C. 84. The words, in this case, were to M. "his executors, administrators, or assigns." Lord *Thurlow*, Chancellor, said, "The only fact to which evidence is offered is, that the death of M. was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible. That could not be from a legatee who had been dead several years." . . . "I must accordingly decree the legacy to be lapsed." Mr. Roper admits that the rule, as applied to this class of cases, produces much hardship, and results, "probably contrary to the intention of testators, but as the rule is clear," it cannot be departed from, unless upon an implication equally clear, that the representatives of the legatee were expected to take as purchasers, and not by transmission. 1 Roper, 467.

* [32] 1 P. Wms. 83. The rule that the word "heirs" shall be regarded as a word of purchase, even in a deed, when that is the evident intent, is very ancient. Archer's Case, 1 Co. 66 *b*; Lord *Hardwicke*, in Bagshaw *v.* Spencer, 2 Atk. 580, and cases cited. And the same rule applies to the release of a debt by way of legacy, where the debtor predeceases the testator. Sibthorp *v.* Moxom, 3 Atk. 580.

Lord Keeper also said it was a doubtful case." It seems finally to have been settled by the parties, pending an appeal to the House of Lords. Lord *Cowper*, in giving judgment, said, "Though it might be the intent of the testatrix, that the executors of the legatee should have the benefit of the legacy (as this is probably always the intent, where a legacy is given to a man, his executors, &c.), yet the law being otherwise, such intent must not prevail, for this reason; a will that designs to prevent the lapsing of a legacy, by the death of the legatee in the life of the testator, ought to be specially penned.

17. The case of Brett *v.* Rigden,[33] although a very early case, * states the foundation of the rule in clear language, and is cited by an immense number of cases, and text-writers, in support of the rule, thus showing its recognition from the earliest times. And it will make no difference, that a legacy be made expectant upon an intervening life interest. This was the point decided in the case of Corbyn *v.* French.[34] And in another more recent case,[35] before Lord *Cottenham*, Chancellor, where the will gave the bequest to the persons named, "*their respective executors, administrators, and assigns, absolutely and forever*," it was held, by his lordship, that no qualification of the rule could be admitted, upon that ground.

18. And an express provision, that in case of the decease of legatees the sum given shall be paid to their personal representatives, or heirs, will not be regarded as any sufficient indication that the

[33] Plowden, 340; 10 Eliz. The principle is here stated thus: "A. devises land to B. and his heirs; B. dies in the life of the devisor; C. the heir of B. shall take nothing by the will (though after the death of B. the devisor said to C. that he should be his heir, and should have all the lands which B. should have had, if he had outlived the devisor), for the heirs of B. were not named, as immediate purchasers, but only to express the quantity of estate that B. should take." S. P. Fuller *v.* Fuller, Cro. Eliz. 422. The same question is discussed at length, in Goodright *v.* Wright, 1 P. Wms. 397. The American cases take a similar view, in regard to the general question. Dickinson *v.* Purvis, 8 S. & R. 71; Trippe *v.* Frazier, 4 Har. & J. 446; Davis *v.* Taul, 6 Dana, 52; Nelson *v.* Moore, 1 Ired. Eq. 31. And it is not held competent, in the American courts, to control this presumption by parol proof, that after the testator became aware of the decease of the devisee, he expressed an expectation that the estate should go to the heir or personal representative. Comfort *v.* Mather, 2 Watts & S. 450. See also, Hutton *v.* Simpson, 2 Vern. 722; 1 Jarman, ed. 1861, 314.

[34] 4 Vesey, 418.

[35] Shuttleworth *v.* Greaves, 4 My. & Cr. 35.

testator intended to provide against such legacy lapsing, but such cases will be governed by the general rule.[36] And where the will provides for an annuity for certain persons, and in the event of their decease without issue, that the same * be divided equally among the testator's "surviving children and their legal personal representatives," this means children surviving the first donees. And where the testator had four children, at the date of the will, and at the time of his decease, none of whom survived the first donees, it was held, that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood, and, consequently, that the fund fell into the residuary estate.[37]

19. And the same principle applies where the payment of the legacy is postponed to the expiration of some period named after the decease of the testator, which is very common, for the convenience of the executor. And the period of one year is often fixed for the payment of legacies, either by custom or statute. Thus, a legacy to A. of £600, to be paid at the end of one year from the testator's death, or to her respective heir, was held to be lapsed by the death of A. in the lifetime of the testator.[38] Sir *John*

[36] Bone *v.* Cook, M'Leland, Exch. 168; 13 Price, 332. In these cases it is considered that the provision in regard to payment to the heirs, &c., had reference only to the decease of the first donee after the decease of the testator, and before the payment of the legacy. And it is not competent to rebut this presumption by extrinsic evidence, that the testator knew of the decease of the legatee or devisee, and had declared that the children of such person should receive a portion. Ritter *v.* Fox. 6 Whart. 99.

[37] Taylor *v.* Beverly, 1 Coll. 108.

[38] Tidwell *v.* Ariel, 3 Mad. 404. In Waite *v.* Templer, 2 Simons, 524, the testator gave to "T. P., or to his heirs, executors, administrators, or assigns," and T. P. died in the lifetime of the testator, and the court held the bequest over was void for uncertainty. But it seems to be implied here, that if but one of these terms had been used, so as to render the identity of the person intended certain, the gift over would have been upheld. This is the construction put upon the case by Lord *Brougham*, Chancellor, in Gittings *v.* M'Dermott, 2 My. & K. 69, where the cases are most elaborately reviewed by his lordship, and the conclusion arrived at, that a bequest to the children of the testator's sister, or "to their heirs," where the children deceased during the life of the testator, created a good gift over, and that the next of kin took, by substitution, at the death of the testator. This case is so reasonable, and, at the same time, seems so much a qualification of some of the cases already referred to, that we should have felt we could not do a more essential service to the profession, than to insert a portion of his lordship's opinion if our space permitted. The Master of the Rolls took the exception, that where a

Leach, said, "If the direction had been, that * the respective legacies should *at his death* be paid to the legatees or their respective heirs, the inconsistency contended for would have existed: but a payment to the representative at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee."

20. But, notwithstanding numerous cases of this character, where the evident intention of the testator has been defeated by holding the words "heirs," "personal representatives," "executors, administrators, and assigns," as words of limitation, intended to define the extent of the interest given, and not words of purchase, and indicating those who should take in the event of the decease of the first donee, during the life of the testator, there is no question a will may be so drawn as to prevent the lapse of a legacy or devise. But it is said in many cases, and in the textbooks, that to this result it must appear to have been the manifest intention of the testator that the legacy should not lapse. And it would seem that a mere expression of such an intention, without naming any person or class of persons who are to take, in the event of the predecease of the first donee, will not be sufficient to prevent the lapse.

* 21. From the earliest periods of English law, it seems to have been recognized as the settled rule, in regard to legacies dependent upon any condition, that such condition should not be construed as creating an absolute bar, unless such seemed to be a result consis-

gift or devise was made to one *or* his heirs, it is a different estate so far as the result, in the event of the first donee dying before the * testator, from what would have been conveyed if the word *and* had been used; that in the former case, it is obvious the testator intended to secure the estate to either, whichever might happen to be in existence at the time of his own decease. And as one can have no heir or legal representative during his lifetime, he would be the donee during his life, and his heir afterwards. And the learned judge also considered that the language of the will, as to the residuary estate, "and upon their deaths respectively to their heirs," evinced an evident purpose to create a gift over to the heir, as persona designata. The argument is certainly very plausible, and were it not for the cases already referred to, and many others of the same class, no one could object to it.

His lordship, the Chancellor, when the case was opened on the part of the appellant, "considered it unnecessary, for the reasons stated in his judgment, to hear the other side." Lord *Brougham's* opinion is so valuable and so characteristic, that we should be glad to give it entire, but for the reason already stated we must refer the reader to the report.

tent with the meaning and intent of the testator.[39] The reason why an express declaration, that the testator does not intend the legacy to lapse, will not alone produce that result is, that if there is no person named to whom it shall be transmitted in case of the decease of the legatee, courts cannot hinder its lapse, where the legatee predeceases the testator, since the legatee, not being in esse at the time the will becomes operative, he cannot take, and his heirs or legal representatives can only take from him, or through him, what has already become vested in him during his life. But where the will provides, that in case of the death of the legatee the legacy shall be paid to his heirs, or to his legal personal representatives, there can be no doubt the gift is saved from lapse, unless, as before stated, it fail in consequence of the uncertainty as to the person, or persons, entitled to take. In an early and leading case[40] upon this point, the will, after giving several legacies, declares, if any of the persons should die before the same become due, that they shall not be deemed lapsed legacies, and gives £50 to Ann, wife of R. W., and to her executors or * administrators. The legatee died before the testator. Lord *Hardwicke* held this not to be a lapsed legacy, and decreed it to the husband, who was administrator of the wife's estate. Accordingly,[41] where the testatrix gave her residuary estate to certain persons, by name, that, "in case of the death of any of them before her, then the share of him, her, &c., should go, be had and received by, his or her legal representatives," and one of the residuary legatees died, it was held, the next of kin should take his share. The Master of the Rolls said, "There is nothing more clear than that a testator may, if he thinks fit, prevent a legacy from lapsing. It is necessary, according to Sibley *v.* Cook

[39] Swinburne, 462, pt. vii. § xxiii (8). The words of this careful writer are, after speaking of the lapse of legacies: "Limitations of this former rule are many. First, when it is the testator's will and meaning, that the conditional legacy be transmitted."

[40] Sibley *v.* Cook, 3 Atk. 572. This case was decided by Lord *Hardwicke*, upon the authority of Darrell *v.* Molesworth, 2 Vern. 378, where the will expressly provided, that if any legatee named in the will should "die before the legacy was payable," it should go to his brothers and sisters, in which it had been held that no lapse would occur in consequence of any legatee dying before the testator. The cases do not appear to have much analogy in principle, but are, no doubt, both correctly decided. In Darrell *v.* Molesworth, the legacy was made payable to the legatee "at twenty-one or marriage."

[41] Bridge *v.* Abbot, 3 Br. C. C. 224.

(3 Atk. 572), not only that he should declare that the legacy should not lapse, but likewise who should take, in the stead of the residuary legatee."

22. The same rule is recognized in numerous, and more recent cases.[42] But where any time is given for the payment of the legacy, after the decease of the testator, there a provision in the will that the legacy shall be paid to the children, or heirs, &c., of the legatee, in the event of his death before payment, according to the usual course of decision, as before stated, has been treated as making the legacy liable to lapse, since the provision in the will may reasonably be supposed to have had reference, solely, to the decease of the legatee, during the time given for payment after the decease of the testator.[43]

* 23. In all this class of cases it is entirely obvious, upon principle, that neither the expressed intention of the testator, shown by extrinsic evidence, nor the conjectural expectation of the testator, in the event of the death of the legatee, an event not specifically provided for by him, and not shown, by any thing in the will, to have been in his mind, can be allowed to control the legal and established construction, or the natural import, of the words used in the will. The only advantage which in such cases can be derived from extrinsic evidence, is to enable the court to place themselves in the precise position of the testator, with his knowledge of extraneous facts and circumstances, so as to enable them to give such a construction to the words as the testator himself would have done; i.e. such as will carry out his intention in using them, as far as that can be clearly gathered from the words of the will. We shall discuss this subject more at length hereafter.

24. It seems to be settled, by all the best considered cases, that extrinsic evidence cannot, as a general thing, be received to support

[42] Long *v.* Watkinson, 17 Beav. 471; Hinchliffe *v.* Westwood, 2 De G. & Sm. 216; Hewitson *v.* Todhunter, 22 L. J. Ch. 76.

[43] Smith *v.* Oliver, 11 Beav. 494. There are many other cases bearing upon this general question, to which we have not specially referred, our desire being at this time to give the principles, fairly deducible from the careful exposition of the cases, and such as are now universally recognized by the profession, in order to illustrate the application of extrinsic evidence to the subject. The subject will be found further discussed in the following cases, in the English reports. Hutcheson *v.* Hammond, 3 Br. C. C. 129, 143; Evans *v.* Charles, 1 Anst. 128 Long *v.* Blackall, 3 Vesey, 486, 490; Booth *v.* Vicars, 1 Coll. 6. See post, pt. 2, § 50.

the claim of one to whom no part of the written description applies.[44] And the same rule applies to the description of the subject-matter.[45] There are, no doubt, numerous cases, which seem to be exceptions to this rule, many of which we have already referred to. But they will be found to have been decided upon other grounds, or else to rest upon no satisfactory basis.[46]

25. The courts do not commonly reject any evidence which in any fair view may be presumed to have a bearing upon the construction of the will. And it is not uncommon for the courts to call for the original draught of a will, or a former will, from which the will in question was made, and inspect them for the * purpose of seeing precisely how the mistake did occur. This was done by Lord *Brougham*, Chancellor, in the important case of Langston *v.* Langston.[47] And his lordship, while deciding precisely in accordance with the light thus obtained, disclaimed all aid from this source, and declared the testimony inadmissible. But where evidence is confessedly inadmissible, it would seem more consistent, and more dignified, in the court, as a general rule, certainly, not to examine it.[48]

[44] Lord *Abinger* in Hiscocks *v.* Hiscocks, 5 M. & W. 362.

[45] Miller *v.* Travers, 8 Bing. 244.

[46] Ante, pl. 13.

[47] 2 Cl. & Fin. 240. His lordship here said: "I had the curiosity to see the draught from which the engrossment was made, and one party were exceedingly anxious my curiosity should be gratified, but that anxiety was met by just an equal anxiety on the opposite side, that it should remain unsatisfied. I, at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I am aware, as a lawyer, that I had no right to look at it, but humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying, and accordingly, when I looked at it, I found that there was a limitation to the first son of a testator's son, J. H. Langston, which the person who made the engrossment had for a very obvious reason passed over, in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your lordships, that I have formed my opinion upon the instrument as it now stands, without matter dehors, without having recourse to the draught. I have no right to look at the draught, but anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived, not dehors the instrument, but one for which you have not to travel from the four corners of the instrument itself."

[48] Blundell *v.* Gladstone, 11 Simons, 467, 488. Sir *Lancelot Shadwell*, V. C.

26. In Blundell *v.* Gladstone,[48] where the devise was to the second son of Edward Weld of Lulworth, Esq., during his life, and it appeared there was no such person, but Joseph Weld was then the possessor of Lulworth. The will gave remainders * to the son of the first donee in tail male, with like remainders to the third and other sons of said Edward, except the eldest. Joseph Weld had an elder brother named Thomas, and had had another brother named Edward, who died a bachelor, many years before. His eldest son was called Edward Joseph, but more commonly Edward, only. His second son was named Thomas. It appeared the testator gave instructions to his solicitor to prepare the will, calling the possessor of this estate Edward Weld; that he was but imperfectly acquainted with the Weld family or their Christian names; that in conversations with the witnesses about the time of the date of the will, as well before as after, he called the possessor of Lulworth, Edward Weld; and that in 1836, or 1837, just before his decease, the will bearing date in 1834, he told one of the witnesses that he had left his real estate to the second son of Edward Weld, of Lulworth Castle; and that he had never seen the second son, and did not know his Christian name. The principal question was, who was intended to be the object of the first gift in the will. The case was discussed at immense length by Sir *James Wigram*, and other distinguished counsel, and decided for the second son of Joseph Weld, called Edward, in the will. The Vice-Chancellor, Sir *L. Shadwell*, in giving judgment, said: "I decide this case upon the words of the will, coupled with that evidence only which has been given as to the state of the Weld family at the date of the will, and which, I think, is the only part of the evidence which ought to be received." His honor said further: "If I had had the least doubt on the question, I certainly should have acted, as a judge of this court, who entertains a doubt, ought to do, and have sent a case to a court of law."

27. The courts have sometimes gone great lengths in tranposing the different portions of a will, so much as even to substitute one name for another, where it was evident, upon the face of the will, with reference to the surrounding facts and circumstances, that such was the testator's intention. As where a * legacy was given to the children of Mary, and to Anne, in equal parts. Mary had

said, in giving judgment, "the case seems to me to be a very simple one, and wholly free from doubt." This case was heard on appeal before the chancellor and two common-law judges, and affirmed. 1 Phill. 279.

no children, and Anne was deceased before the making of the will, leaving two children. The court held it to be so apparent, that Mary meant Anne, and Anne Mary, that they decreed accordingly.[49]

28. And some cases present nothing, more or less, than the unqualified admission of extrinsic evidence to explain the intention of the testator, and to correct an evident mistake. And where this is done, for the purpose of determining which of two persons, equally answering the words of the will were intended, and where it is apparent, from comparing the words used with the surrounding facts, that one of the two was in the mind of the testator, the evidence is clearly admissible, although it may in effect correct an obvious mistake in drawing the will.

29. Thus, where[50] the bequest was to "Robert Careless, my nephew, the son of Joseph Careless," and it appeared that the testator had two nephews by the name of Robert, one son of his brother John, and the other son of his brother Thomas, but that he had no brother Joseph. The testator had mentioned his nephew Robert three times in his will before, and the last time added, "son of my brother John." The evidence for the plaintiff proved that he lived in London, where the testator also resided, and on terms of intimacy with him, while that on the part of the defendant showed, that he lived in Hampshire, that when he was in London, "fifteen or sixteen years ago," he was * introduced to the testator, and favorably received. It was evident the only doubt arose in regard to which of the nephews, Robert Careless, was intended, and all the circumstances seemed to concur in indicating that it must be the plaintiff, the son of John, since he was entirely familiar with him, and had already noticed him in his will, as the son of John Careless, his brother, and if he now were to give a legacy to another Robert Careless, he would be reminded that he had two nephews of that name, and would obviously have designated which. His not having done this seemed to the Master of the Rolls, Sir

[49] Bradwin *v.* Harpur, Amb. 374. We can scarcely regard this case as resting upon any fair principle, although it seems not to be questioned in any edition of Jarman. 1 Jarman, Eng. ed. 1861, p. 469, where it is referred to with apparent approbation. But the majority of the cases in the English books, where it became necessary to substitute one portion of the will in the place of another, so as to give it an opposite meaning, in order to make it sensible, have been held void for uncertainty, and with propriety, we think, since such a substitution, is really *making the will over again.*

[50] Careless *v.* Careless, 19 Vesey, 601; s. c. 1 Mer. 384.

William Grant, satisfactory, to show that he had not in mind, at the time, the existence of two nephews of the name of Robert Careless. "Indeed," says the learned judge, "it is uncertain whether the testator knew that the Christian name of the other nephew was Robert: if, therefore, he had spoken only of his nephew, Robert Careless, the presumption would have been in favor of that nephew, whose name he certainly knew, and who, as being intimately known to him, was most likely to be present to his recollection." As then the addition, "the son of Joseph Careless," did not apply to either nephew, it must be wholly rejected, as unmeaning. That left the words of the will equally applicable to both, and clearly admitted of the reception of extrinsic evidence, to show which was intended, which the court determined in the manner already stated. The opinion of the learned judge is the best commentary upon the case. "In the cases which have been cited, the name belonged to one, and the superadded description to the other of the claimants. In the present case, the name belongs to both; and the superadded description is equally inapplicable to either. That there were two nephews of this testator, both named *Robert*, and neither the son of *Joseph*, are facts dehors the will, therefore constituting a latent ambiguity. The evidence, which must, consequently, be admitted to explain the will, shows that the testator was intimately acquainted with the one, and little * known to the other; so little, indeed, that it does not appear he knew him by name. The presumption, therefore, is, that the testator intended that nephew whom he knew best, and with whose name it is certain that he was acquainted. Supposing, however, that this inaccurate description should be taken, therefore, to apply to the plaintiff, the testator has not always applied to him the same description, but has sometimes called him his nephew *Robert*, generally; and sometimes, rightly, *Robert*, the son of his brother John; and thence it is argued, that, as it is plain he knew the plaintiff by his right description, so it cannot be imagined that he inserted a wrong description, intending it should apply to him. But it must be observed, that the claim of the plaintiff to the property given by the general description of the testator's nephew, *Robert*, is not disputed, although it is, in words, equally ambiguous with this which is disputed. This amounts to an admission, on the part of the defendant, to the full extent of what the plaintiff would establish by his evidence. Then, it is not pretended that the testator could have

meant anybody but one of his two brothers, *John* and *Thomas*, by the description of *Joseph Careless;* nor can it be supposed that he was, in fact, ignorant of the names of his brothers. It was, therefore, a mere slip of the pen; and then, what name did he intend to write? Not *Thomas;* for then it must have been brought immediately to his mind that he had two nephews of the name of *Robert*, to one of whom he had already given as the son of *John;* and the necessity of distinguishing between them would, in that case, have induced him to describe the other accurately. If he had only one of his nephews in his mind during the whole time that he was making his will, it is natural to conceive that such a mistake might have been made by mere inattention; but, as actual ignorance is out of the question, such a mistake would not be reconcilable with the supposition that the testator at all thought of his *other* nephew *Robert* so as to bring into his mind the necessity of marking *which* of the two he intended. During the time that he was making his will, * therefore, he forgot (if indeed he ever knew) that he had any nephew called *Robert* besides the plaintiff."

30. The case of Still *v.* Hoste,[51] has generally been referred to the same head of latent ambiguity. But it is a case which carries the point further than most others. The legacy was given to "Sophia Still, daughter of Peter Still of Russell Square." Peter Still, at the death of the testator, had only two daughters, Selina and Mary Ann. Selina Still claimed the bequest. It was proved that she was the god-daughter of the testatrix, and the attorney who made the will and another person "proved, beyond doubt, that Selina Still was the daughter meant, and that the mistake was probably owing to the person who copied the will." The Vice-Chancellor, Sir *John Leach*, after argument by eminent counsel, disposed of the case very briefly, in favor of the claimant.

*[51] 6 Mad. 192. The opinion is in these words: "There can be little doubt that Selina Still is entitled to the legacy; but the other daughter being an infant, let it be referred to the Master to inquire who was the legatee intended by the description in the will of the testatrix." The case seems, therefore, to have been decided, as it must have been, to be made to stand with established principles, upon the ground that the name used in the will applied to no one, and might, therefore, be rejected. The description only remaining, it was a legacy to the daughter of Peter Still. There appearing to be more than one daughter, it became a case of latent ambiguity, and the declarations of the testator at the time of giving directions to draw the will were receivable, to show which of the daughters was intended. In this view the case may stand with principle.

31. And in Price *v.* Page,[52] where a legacy was given to —— Price, son of —— Price, and the plaintiff was the only person claiming the legacy, evidence was admitted that the testator had said that he had, or would, provide for the plaintiff, and that he had left him something by his will, and the case is, by judges and learned text-writers, referred to the head of latent ambiguities,[53] * but it seems to us that no case of equivocation is presented, there being but one claimant, and no evidence that the terms could have been applied to any other person. Indeed, this latter ground seems to have been the true ground of the decision, as matter of construction. For in support of the claim it was proved, that the plaintiff was a son of the niece of the testator, that his father's name was Price, that the testator had no other relation of that name, and that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the retainer. As matter of construction, then, it was shown to a legal certainty that the plaintiff must have been the person intended. It is not, therefore, a case of latent ambiguity, and direct evidence of intention was not admissible.

32. A case is reported by Sir James Wigram,[54] where a testator devised his estate, in the county of A, to B and her heirs. The testator had not at the time any estate in the county of A. But he had estates in four other counties, B, C, D, and E. The estate intended for B was in the county of E. The evidence by which it was proposed to prove the intention consisted of the instructions given for preparing the will, the declarations made by the testator to his steward, and a letter he wrote to B, about the time of

[52] 4 Vesey, 679.

[53] 1 Jarman, 406. Of the three cases here cited it was said by Lord *Abinger*, in Doe *v.* Hiscocks, 5 M. & W. 370, that they did not materially differ from that class of cases where the gift is to a particular relation, as "my brother;" and "it appears the testator had more than one brother. Here the equivocal description was not entirely accurate, but it was equally applicable or inapplicable to all the claimants, or it was a mere blank. His lordship, therefore, concluded that all these three cases might fairly be classed under the head of equivocation, and thus admit of evidence showing the intent of the testator. And that is true of all of them where there were different persons equally answering the description, but cannot properly be affirmed, where only one person appears to answer any portion of the description, or name, as in Price *v.* Page. Here could not be said to be any case of equivocation.

[54] Wigram on Extrinsic Evidence, 121 (112).

making the will. "The opinions of several gentlemen of the first professional eminence, two of whom now fill high judicial stations, . . . were taken upon this case, and all * agreed in thinking the evidence admissible." The learned author seems also to regard the case as sound, and we are not prepared to say that it is not in accordance with the principle upon which many of the cases already alluded to profess to go, and upon which they are still regarded as sound. When the addition of the county of A is found to have no application to any of the testator's estates, it is the same as if not found in the will, and the will then stands the same as if the testator had devised his estate in the county of —— to B. If, upon inquiry, it was found that the testator had but one estate, that would unquestionably pass. But it appearing he had different estates in different counties, it presented a latent ambiguity, which it was proper to remove in the ordinary mode.[55] In the case of Stringer *v.* Gardiner, the facts of which we stated before,[56] the legacy was made to my niece, Elizabeth Stringer, and the testator had no such niece living, but a great-grandniece named Elizabeth Jane Stringer, who was the grand-daughter of his niece Elizabeth Stringer, and there was no other one of the testator's relatives of that or any similar name, and no one claimed the legacy except the great-grandniece. Extrinsic evidence was offered to show that the testator had first made his will * during the life of his niece, and in renewing it after her decease this legacy had been copied without altering the name or description, but was really intended for the niece twice removed. The Master of the Rolls held, that the evidence could not be received, there being

* [55] The following cases are referred to in Wigram as bearing upon this point: Altham's Case, 8 Co. 155; Harding *v.* Suffolk, 1 Ch. Rep. 74; 3 Willson, 276; and some other authorities, already discussed, which, however, throw no special light upon it, containing only the general proposition that the writing cannot be contradicted by parol, or explained, save only in two particulars, in which both courts of law and equity act upon precisely the same principle, and admit such proof only to explain a latent ambiguity, and in rebutting resulting trusts, which is very fully explained in Ulrich *v.* Litchfield, 2 Atk. 372. But in the late case of The Clergy Society in re, already stated, ante, § 40, pl. 14, it was held, that where the testator made a bequest to a society by name, in London, and it appeared there was no such society in London, it could not be shown that the testator intended some society by that name, out of London. See also, Bennett *v.* Marshall, 2 Kay & J. 740; Stringer *v.* Gardiner, 5 Jur. N. S. 260; 27 Beavan, 35; 4 DeG. & J. 468; Goode *v.* Goode, 22 Mo. 518.

[56] Ante, § 40, pl. 12.

but one person living of the name mentioned in the will; but that it was a legacy to Elizabeth Jane Stringer, the great-grandniece of the testator, or niece twice removed, since it is not uncommon to call such a relative a niece, and the additional Christian name creates no uncertainty, unless there is another niece without that name. There would have been nothing in violation of principle to receive parol evidence to show whether the testator meant Elizabeth Stringer, or Elizabeth Jane Stringer, since both names sufficiently answered the words of the will, and in the former case the legacy would be lapsed.

33. The case of admitting extrinsic evidence, to explain the meaning of nicknames, has been sometimes referred to the same principle as that of explaining latent ambiguities. Sir James Wigram, in his valuable commentary upon this subject, inclines to the opinion that parol evidence is only receivable in cases of latent ambiguities, to show in what sense the testator used the terms found in his will; in other words, what persons or things the words represented in his mind.[57] However that may be, there is nothing better settled than that where it appears that the testator was accustomed to call certain numbers of his family, or others, by any soubriquet, such as pet names, or nicknames, and such names occur in the will, parol evidence is receivable, to show what persons he was accustomed to designate in this manner. And the same rule would, undoubtedly, apply to any unusual mode of designating his property, either his real or personal estate, as if he should give Jenny, or Fanny, or Old * Jim, to certain persons, it would be proper to show that the testator called certain animals by these names. So if he should give his back lot, or hunting-ground, or sugar-orchard, there could be no question that the identity and extent of the subject-matter must be determined by parol evidence.[58] Where only sur-

[57] Wigram on Extrinsic Ev. (116), 124. "Perhaps the more simple explanation is, that the evidence only determines what subject was known to the testator by the name or other description he used."

[58] Anstee *v.* Nelms, 1 Hurlst. and Norman, 225. Here the testator owned a farm in the parish of Doynton. One piece of the land, part of this farm, and surrounded by land in Doynton, was in fact in another parish. By his will, dated in 1804, he devised all his lands in Doynton to his daughter, with remainder, &c. The jury found, from the evidence in the case, that at the date of the will the whole farm was generally reputed to be in the parish of Doynton, and was so rated up to the year 1823, since which it had been rated in another parish, where it actually belonged. It was held, that the evidence was properly receivable, and

names appear in the will, it is allowable to prove aliunde that the testator was accustomed to call certain persons in that way.[59]

* 34. There is one decision[60] by Sir *James Wigram*, while Vice-Chancellor, carrying the rule of construction upon extrinsic evidence much further than has generally been allowed. It is cited by Mr. Jarman, vol. 1, p. 392, as coming under the head of nicknames. The testator gave "to Mrs. and Miss B., the widow and daughter of the late B., £200 each." The legacy was decreed to the widow and daughter of Mr. David Washbourne, who had been a dissenting minister at Hammersworth, the widow being the daughter of a Mr. Bowden, the name used in the will, with whom the testatrix was intimately acquainted, and also with the persons to whom the legacy was decreed, and used to call them by Mrs. W.'s maiden name of Bowden, and on the mistake being pointed out, would say she meant the lady of the minister at Hammersworth, the daughter of Mr. Bowden. Mr. Bowden left a widow, who died in 1820, the codicil in question bearing date in 1836. The Master rejected the evidence, and disallowed the claim. The Vice-Chancellor reversed the decision of the Master and allowed the claim, saying, that if

that the whole estate passed under the will. Some discussion arose here in regard to the primary meaning of words, defining an estate by the parish, whether that imported what was commonly reputed to be in the parish, or what should, upon the most critical examination of ancient documents and precise lines, prove to be in fact in the parish. And the judges concur in the opinion that the common reputation, in regard to the locality of the estate, at the date of the will, must be presumed to be the meaning of the testator.

This subject has been carried to such an extent, in some cases, Smith *v.* Nelson, 3 B. & Ad. 728, that definite number has been allowed to be qualified by the usage of particular districts, as where the lessee of a rabbit warren covenanted to leave on the warren 10,000 rabbits at the expiration of the term, it was held competent to show, by parol evidence, that by the custom of the county where the lease was made, the word "thousand," as applied to rabbits, denoted twelve hundred, and the learned judges, after elaborate argument, confirm this view by fully reasoned opinions. *Parke*, J.: "No specific meaning has been given, by the legislature, to the word 'thousand,' as applied to rabbits, and therefore it must be understood according to the custom of the country; and evidence was admissible to show what that was." We should feel compelled to say, with *Bronson*, J., in Hinton *v.* Locke, 5 Hill, N. Y. 438, "I should feel great difficulty in subscribing to that case." But the case is cited by the learned editors of Mr. Jarman's last edition, with no mark of disapprobation, p. 392 and note. See also, Richardson *v.* Watson, 4 B. & Ad. 787.

[59] Rolfe, B., in Clayton *v.* Lord Nugent, 13 M. & W. 207.

[60] Lee *v.* Paine, 4 Hare, 251.

Mrs. Bowden had been living at the date of the codicil, and Mrs. W. still unmarried, as they would have answered the words of the will, "a question of much greater difficulty would have arisen." But as there were no other claimants, and there appeared a good degree of certainty that these persons were intended, he decreed accordingly. The case is not exactly one of nicknames, but of calling a person habitually by a wrong name. As a general rule it rests, we think, upon very questionable grounds. But it was ruled by a very able judge, and is cited, with approbation, by 1 Jarman, p. 392. As a non-contested case, on the ground of general acquiescence, it may fairly be justified as reaching the probable intent of the testator by construction.

35. There can be no question, as before stated, that if a will be made in a foreign language, evidence may be received to show the * meaning of the words, and to translate the will into the vernacular.[61] The sixth resolution of the court here is, — Where the will was written blindly and hardly legible, and as to money legacies, written in figures, it was referred to the master, to see what these legacies were, "and to be assisted by such as were skilled in the art of writing."

36. And where a question arose, in regard to the amount of a legacy, on account of a doubt as to a figure, an issue was directed, instead of a reference to the Master.[62] And a will written in short hand, or in cipher, may be explained.[63]

37. So where a statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written, it was held competent to refer that question to the Master, and that he might take the assistance of persons skilled in writing, and also of those acquainted with articles used by statuaries.[64] Here

* [61] Masters *v.* Masters, 1 P. Wms. 421.

[62] Norman *v.* Morrell, 4 Vesey, 769.

[63] *Alderson*, B., in Clayton *v.* Lord Nugent, 13 M. & W. 200, 206. Here the testator did not name any devisees, but gave his real estate first to K., then to ——, then to L., then to M., &c. The testator, on a piece of paper attached to the will, at the time of the execution, stated that "the key and index to the letter, initials, &c., was in a writing-case in the drawer of a writing-desk, on a card." At the time of the testator's decease, a card was found in the place designated, explaining the meaning of the initials and characters used in his will. This was dated nearly a year before, and one of the witnesses had seen a similar card, before the testator, two years before his decease. It was held, that the card was not admissible, to explain the meaning of the will.

[64] Goblet *v.* Beechy, 3 Sim. 24. The accidental circumstance of the learned

the person called to aid the Master, as being skilled in the art of writing, declared he could form no judgment what was meant by "mod," the word in question. The sculptor, who testified before the Master, considered the * word must have been intended to signify "models." Upon this evidence, the Vice-Chancellor decreed the models to the plaintiff, notwithstanding they were given to another in clear terms in a former portion of the will. But on hearing before the Lord Chancellor, *Brougham*, this decree was reversed, and the models decreed to the former legatee, upon the ground, that if property is given to one in clear and unambiguous terms, a subsequent bequest of the same property to another, must, to become effectual, designate the property in such unequivocal terms, that no reasonable doubt can be entertained in regard to their import. His lordship placed stress upon the fact, that this term occurs in an enumeration of the articles of furniture in the shop, including the testator's tools, all of which were of very little value, and of no great interest to the testator, while his models were of the greatest interest to him, and of very considerable value.[65]

38. In a late case,[66] the testator gave a legacy to his son William, expressed thus, i. x. x. and to another son, o. x. x. These letters were written in pencil in the original will, but were included in the probate. The testator had been accustomed to use certain private marks to denote prices in his business of a jeweller. Extrinsic evidence was given to show, that the letters found in the will represented the sums of £100 and £200. The cases of Goblet *v.* Beechy, supra; Clayton *v.* Nugent, supra; East *v.* Twyford,[67] were cited, but the Master of the Rolls, Sir *John Romilly*, admitted the evidence. We can see very little distinction, in principle, between this case and that of Clayton *v.* Lord Nugent,[68] where the evidence was * rejected. There can be no difference, in regard to the security afforded by having all testamentary acts reduced to writing,

author being present in court, during the hearing of this case, is the source to which the profession are indebted for the invaluable Commentary of Sir James Wigram upon Extrinsic Evidence in aid of the Interpretation of Wills. See Preface to 1st edition.

[65] 2 Russ. & My. 624.

[66] Kell *v.* Charmer, 23 Beav. 195. In a mining contract, where the word "level" occurs, extrinsic evidence may be given to show its import in that business. Clayton *v.* Gregson, 5 Ad. & Ellis, 302.

[67] 9 Hare, 712; 4 Ho. Lds. Cas, 517, and Shore *v.* Wilson, 9 Cl. & Fin. 555.

[68] 13 M. & W. 200.

whether the claimants are allowed to make title through the proof of the habit of the testator, in using certain figures, or symbols, as indicative of sums of money, where the bequests are otherwise in blank, or the devises are identified by resort to written definitions of similar symbols made by the testator, and expressly referred to in the will, as being found in a certain drawer, or other locality. If there is any difference, in regard to the degree of certainty produced, by these different modes of proof, it seems to us altogether in favor of that which was rejected in Clayton *v.* Lord Nugent, and as being more satisfactory than that which was admitted in Kell *v.* Chamer. There is undoubtedly a difference, in principle, in the two cases, which is not altogether unimportant. In the latter case, the bequest is made effective, solely through the force of words found *in the will*, whereas in the other cases the offer was to incorporate other writings, made by the testator, as a substantive part of the will itself, and without which considerable portions of it would become entirely inoperative, by means of their incompleteness.[69]

39. But we have before seen, that the testator may, by reference to extrinsic documents, make them a part of his will, as perfectly as if they had been written out. This is allowed, much upon the same principle that extrinsic facts are allowed to be referred to, in order to identify the subject-matter of a bequest. As where the testator devises the "home and garden I live in,"[70] it was held, that parol evidence might be resorted to, for the purpose of identifying the premises, and where it was found, that the testator had been accustomed to occupy a stable and * coal-shed, in connection with the premises, it was held, they would pass also by the devise, although not named, and the coal-shed was not inclosed in the same "ring-fence," and had sometimes been used by the testator to keep coal for purposes of trade, as well as for the use of the house. But it had never, as far as appeared, been used in connection with any other premises, and was therefore held to pass. But by the use of the word "appurtenances," in connection with the devise of a messuage, lands adjoining the tenement will not pass, even where

[*69] We shall have occasion hereafter to examine the question of reference to an extrinsic document.

[70] Clements *v.* Collins, 2 Term R. 498. See also, 2 B. & P. 593; 73 Taunt. 147; Goodtitle *v.* Southern, 1 M. & Sel. 299. In this last case the devise was of a particular farm by name, in the occupation of A. C., it was held the farm would pass, although not all in the occupation of A. C.

they have been, for a considerable time, occupied in connection with it, unless there is something in the other portions of the will, or in the intimate connection between the house and the land, clearly to indicate that such was the purpose of the testator.[71]

40. But circumstances will often require courts to give a much larger operation to the words, "appurtenances," "thereunto belonging," and similar terms, than would be entirely consistent with their strict legal import. Hence in the case of Doe d. Gore *v.* Langton,[72] where the testator devised "all his * manor, or reputed manor, of B. M., in the county of Somerset, with the mansion-house thereunto belonging, and the park, and also all his freehold messuages, lands, tenements, and hereditaments, *thereunto belonging*." The manor had been in the testator's family several generations. The will was dated in February, 1801; and it appeared, that in October, 1800, the testator purchased a farm, which was adjoining to, and in some respects intermixed with the manor, and it was held, that the history and condition of the family might be proved, in order to show the probable intention of the testator, in regard to the farm passing with the manor, and that as it seemed evident, from these extraneous circumstances, that it was the intention of the testator that the lands in question should pass as part of the estate, and as it might be inferred, from the game-keeper having shot over upon these lands, that they were regarded by the testator as part of the estate of the manor, it was proper for the court to construe the words, "thereunto belonging," in a popular sense, at least as equivalent to "situate within the manor," and that they passed by the will.

[71] Buck d. Whalley *v.* Nurton, 1 B. & P. 53. *Eyre*, Ch. J. said: "If we had found a house situated in a park, which had always been occupied with it, and was, as it were, an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word 'appurtenances' in a sense different from its technical sense."

[72] 2 B. & Ad. 680. Lord *Tenterden*, Ch. J., in giving judgment, said: "It sometimes happens, that the language of one will is so nearly like that of another, as to make a decision upon the first a plain authority to govern the second; but this does not always happen; and very small changes of language have often led to a difference of interpretation. The extrinsic facts, in this case, leave us room to doubt, that the testator intended his newly-acquired property to pass, by his will, as part of his Barrow estate; but, nevertheless, it cannot pass, unless the meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention, and to be sufficient to authorize

41. There is an important case,[73] decided by one of the * acutest and most accurate of the English equity judges, Sir *William Grant*, M.R., wherein this subject is so lucidly discussed, that we venture to insert the substance of the opinion in the note, as the most valuable commentary which we could give upon this subject. The testator had contracted for the purchase of a house, and afterwards, by a codicil to his will, gives to his executor "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction, that the purchase-money for the house shall be so provided for; and evidence was admitted to show, what was the order given by the testator with reference to the cutting of timber. The propositions declared by the learned judge, in delivering his opinion, were, that the meaning of an ambiguous will is to be collected from the words and the context, and not mainly from the punctuation. Where the testator has the right to do a thing, and states that it is to be done, he must be supposed to speak imperatively, and not by way of recital. Where the subject of a

us to put such a construction on the words *thereunto belonging*, as will accord with, and give effect to, that intention."

* [73] Sanford *v.* Raikes, 1 Mer. 646. The learned judge here says: "I had always understood, that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact, and, through that medium, to ascertain the subject of the devise. I do not see what this has to do with cases where there is a reference to some paper that is to make a part of the will. There it may be contended, that the will itself must specify the paper that is to be incorporated into it. Here the question is, not upon the devise, but upon the subject of it. Nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised. When there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given, till it is shown, by extrinsic evidence, what estate it was that was purchased of A., or what farm was in the occupation of B. In this case, the direction with regard to the payment for the house amounted, in effect, to a devise of so much of the produce of the timber ordered to be cut down as * should be sufficient to pay for the house. What is there in the fact here referred to, — namely, an antecedent order for cutting down timber, — that makes it less a subject of extrinsic evidence, than such an one as I have alluded to? The moment it is shown, that it was a given number of trees growing in such a place, or ten thousand pounds' worth in value of the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the will."

devise is described, by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and so render certain the subject of the devise. This is not like the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it.[74]

* 42. The learned author of the treatise on Extrinsic Evidence, in his fifth proposition, thus declares the rule upon this subject: "For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will."

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown, that a knowledge of extrinsic facts can, in any way, be made auxiliary to the right interpretation of the testator's words."

43. The competency of extrinsic evidence to explain the intention of the testator, and the impracticability of its admission upon the mere ground of thereby reaching the intent of the testator, are strikingly illustrated by a leading case,[74] where the question turned upon the admissibility of extrinsic evidence to control the legal effect of the will, as it appeared upon its face. The testator made his will, in 1752, disposing of his real estate, and in 1756 he made another will, altering these dispositions, but in neither of them did he make any disposition of his * personal effects, or appoint an ex-

[74] Lord Walpole *v.* The Earl of Cholmondeley, 7 T. R. 138; s. c. 3 Vesey, 402, by name of Lord Walpole *v.* Lord Orford. The point discussed in the last report, where the case came before the Court of Chancery, on a bill by * those in whose favor the will of 1856 had been made, upon the ground that this was made in pursuance of an agreement between the testator, and a family relative, to make mutual wills, in favor of each other's families, which by the terms of the compact would be irrevocable. The bill proceeded, therefore, upon the ground that the revocation of this will, not being within the power of the testator, was wholly inoperative. The bill was dismissed, the Lord Chancellor being of opinion, that the relief sought was not consistent with the frame of the bill, and, therefore, not to be given, under the general prayer; and that, upon the evidence, the agreement was uncertain and unfair, and not to be executed.

ecutor, or make any provision for the payment of his debts. In 1776, he sent for his solicitor, to make a codicil for these purposes, and directed him to call upon his steward for the will, meaning that of 1756. But the steward having only that of 1752, gave that to the attorney, who drew the codicil, reciting that by his last will and testament, *dated 25th November*, 1752, the testator had disposed of his real estate, but had not charged the same with the payment of debts or legacies, or disposed of his personal estate, or appointed executors, and declared that writing to be a codicil to his *said* last will, and to be accepted and taken as part thereof, and revoked the same, so far only as it was incompatible with the codicil. It appeared the testator told one of the witnesses of the arrangement (stated in note 74), for making mutual wills. And it appeared also, that in making the codicil of 1776, he expressed no purpose of making any alteration in regard to his real estate, further than subjecting it to the payment of debts and legacies. The question was, whether the parol evidence could be received, to control the effect of republishing the former will, by the codicil, and thus unintentionally revoking the will of 1756. The Court of Common Pleas, and afterwards the Court of King's Bench, on error, held the testimony inadmissible. In this case it had been argued, that there was a latent ambiguity, there being two wills, and the word "last" applied more to that of 1756, while the date was that of 1752. And Lord *Kenyon* intimated an opinion, that under a state of facts, slightly different, it might have been treated as a case of latent ambiguity. "Supposing," said his lordship, "Lord Orford had said to the attorney, 'I have two wills, in the steward's hands, . . . desire him to send me the last will,' and the steward had by mistake sent him the first, and that mistake had been shown by parol evidence, there would have been a latent ambiguity; and it seems to me (though the opinion is extra-judicial), that the ambiguity might have been explained by other parol evidence, on the same principle as in the instance of * cancelling a will, where parol evidence is admitted to show, quo animo, the act was done; or, as in the case of a child destroying a deed."

44. It is very obvious that the learned judge here confounds an act, resting wholly in parol, with one depending for its effect altogether upon writing, and thus loses sight of the question involved, without being at all conscious of the confusion of ideas, either in his own mind, or in his language. If, by mistake, the steward had

brought the wrong will, which the testator had destroyed, under the misapprehension thus induced, the act would not have amounted to a revocation, notwithstanding the destruction of the paper, or its partial destruction or obliteration, as the case might be, the animo revocandi being wanting, which is as essential to the legal result, as the mechanical act of obliteration. But this all rests in parol, and when the mistake is shown, it goes for nothing. And the same is true of any other unintentional destruction of an instrument. But that argument does not touch the question of explaining, by extrinsic evidence, an act done in writing. This can never be done, except by reforming the writing in a court of equity.[75]

45. Parol evidence, as has already been intimated, is always admissible, for the purpose of rebutting a resulting trust, as this does not contradict the will, but tends to support the legal title of the devisee, against the effect of a trust resulting from the implication of law.[76] And in some cases, such evidence is held admissible for the purpose of attaching a trust.[77]

46. It was upon the former ground that the early English cases allowed the executor to rebut any presumption of trust, in * favor of the next of kin, as to the residuum of the estate belonging to him, because of a specific legacy being giving him in the will,[78] which would seem, prima facie, to create a presumption, that the testator did not intend his executor should have any more out of his estate.

47. Such evidence may also be resorted to, for the purpose of showing, whether portions given in codicils, or in subsequent portions of a will, were intended as mere repetitions of, or in addition

[*75] 1 Story Eq. Jur. § 180 *a*. Equity will not interfere to correct mistakes in a will, as where the wrong name is inserted as legatee, by mistake of the scrivener. Yates *v.* Cole, 1 Jones, Eq. 110. See also, cases cited in 1 Story, Eq. Jur. § 180 *a*, and notes.

[76] Mallabar *v.* Mallabar, Cas. t. Talbot, 79.

[77] Collins *v.* Hope, 20 Ohio, 492.

[*78] This is now controlled by statute in England, 1 Wm. 4, ch. 40. And it never had any practical existence in the American states, the executor being here regarded much in the same light as an administrator, and the appointment in the will treated as the nomination of the person whom the testator desires to be intrusted with the execution of the trusts of his will. But it is never supposed here, that the executor has any claim to the residuum of the personal estate, after paying debts, legacies, and charges. If there is a residuum, and no bequest of such residuum, it goes, of course, to the next of kin under the statute of distributions.

to, former legacies, given to the same persons, or in satisfaction of portions due to children by family settlements, marriage-contracts, and similar provisions, the general presumption of law being, that such legacies, if of equal amount, were intended as satisfaction, for portions due the same person,[79] or where of less amount, then pro tanto.[80] It seems, too, that extrinsic evidence is admissible, for the purpose of rebutting the general presumption, that a legacy of equal or larger amount was intended as a satisfaction of a debt due the * legatee from the testator.[81] The following extract from the opinion of Lord *Eldon*, Chancellor, in the case last cited, contains the best commentary upon the English cases upon this point. "The Lord Chancellor stated Chancey's case,[82] Fowler *v.* Fowler,[83] before Lord *Talbot;* Hobbs *v.* Tate ;[84] a bequest of £50 to a servant, to whom wages were due to the amount of £98; and the legacy was held not a satisfaction, on account of extraordinary services ; not what the servant was hired for. Duffer *v.* Chalcroft,[85] Stamer *v.* Wade,[86] Shudal *v.* Jekyll,[87] Richardson *v.* Greese,[88] Debeze *v.* Mann.[89] The Lord Chancellor stated the last case from his own note, and the cases before Lord *Hardwicke*, from the notes of Mr. Joddrell ; Mr. Browne (the king's counsel); and Lord *Hardwicke's* manuscript notes ; by which the printed report of Richardson *v.* Greese,[90] appeared to be correct ; Lord *Hardwicke* expressing his opinion, that, by the penning of the will, there was no satisfaction ;

[79] The rule of evidence, under the present English statute, defining the rights of executors, seems not to be the same it was under the old law. Love *v.* Gaze, 8 Beav. 474.

[80] Pym *v.* Lockyer, 5 My. & Cr. 29. And so is parol evidence admissible, for the purpose of showing that an advance, made by the testator during his lifetime to one of the legatees, was intended as an ademption of a legacy. Rogers *v.* French, 19 Ga. 316 ; May *v.* May, 28 Ala. 141. So also, to show that a legacy, not referring to a deed, was intended as a substitute for it, the testator supposing it void. Webley, Langstaff, 3 Desaus. 504.

[81] Wallace *v.* Pomfret, 11 Vesey, 542.

[82] 1 P. Wms. 408.

[83] 3 P. Wms. 353.

[84] In Chancery, 1738.

[85] In Chancery, 1740.

[86] In Chancery, MSS., Mr. Joddrell.

[87] 2 Atk. 516.

[88] 3 Atk. 65.

[89] 2 Bro. C. C. 165, 519.

[90] 3 Atk. 65.

and laying considerable stress upon the words, "after debts and legacies are paid." His lordship then proceeded thus:[91] "All the cases authorize the admission of evidence, which is clearly to be admitted in this instance; and I am very sorry to add, that I think myself fully justified by all the cases in saying, that evidence has not only been admitted, but at least as much effect has been given to it as can be said fairly to belong to it. I do not except from this observation, even Lord *Thurlow* himself, in the case of Debeze * *v.* Mann;[92] for in that case, his lordship held this, upon the whole, that though the testator had given the legatee £1,000 upon marriage, and afterwards in his life, £600 more, in all £240 more than the legacy, yet the legacy was to be paid; construing the expression, that there would be more hereafter, as his life was a bad one, as indicating an intention to give something more at his death; and therefore, that the gift of £600 more between the marriage and his death did not satisfy that declaration. I think, I may venture to say, a determination, taking the other course, might probably have been justified: the testator, alluding to his death in no other terms than by saying, his life was a bad one. That case is decisive to show, that evidence must be admitted; and the length to which the court will carry it. But, looking at the parol evidence in this case, it is infinitely stronger than in any of the cases in which evidence has had effect; provided it is believed; and there is great hazard, I admit, of deciding upon what is not true; but I have no right to reject this evidence as false. The first part of this declaration brings this very much to the case I have cited from Mr. Browne's[93] manuscripts; that the legacy was for her attention to him in sickness, and the wages for service. The subsequent part of the evidence is an express declaration as to what he owed her for wages, that he intended to put her money out at interest. It is true, as has been observed by Mr. Romilly, he might have reduced the legacy: but the case, if put upon that, cannot be reconciled with what was done in the case upon Sir Joseph Jekyll's will,[94] and the other cases."[95] Sir *John Leach* held,[96] that a pro-

[91] "This account of the beginning of the judgment ex relatione."

[92] 2 Bro. C. C. 165, 519. Stated also by the Lord Chancellor from his own note.

[93] The king's council, in the time of Lord *Hardwicke*.

[94] Shudal *v.* Jekyll, 2 Atk. 516.

[95] Richardson *v.* Greese, 3 Atk. 65.

[96] Weall *v.* Rice, 2 Russ. & My. 267, 268.

vision in a will is prima facie to be regarded as * a satisfaction of any prior provision by way of settlement, and that slight differences in the provisions, such as leave them substantially of the same nature, will not rebut the presumption. But that this presumption may be repelled, or fortified, by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence of the intention of the testator, at the time of making the will. The opinion of this learned judge, in an earlier case,[97] is commonly regarded as giving the rule which should prevail upon this question. "One primary principle is, that evidence is not admissible to contradict a written instrument. In some cases courts of equity raise a presumption against the apparent intention of the testamentary instrument, and there they will receive evidence to repel that presumption; for the effect of such testimony is not to show, that the testator did not mean what he has said, but on the contrary, to prove that he did mean what he has expressed." [98] But it seems to us that if extrinsic evidence is admissible at all, in regard to the intention of the testator, upon a given point, it should be received generally, and not restricted to a particular state of the will, or of its construction. And the truth probably is, that so far as the rule, that a legacy is to be regarded as payment of, or in satisfaction of an existing debt, is founded upon a prima facie presumption of law, it is, upon general principles, liable to be rebutted by extrinsic evidence of a contrary intention by the testator. And so far as the result depends upon the words of the will, or the construction which the courts give such words, it is not to be explained, or contradicted, by extrinsic evidence.[99] The American rule upon the point of receiving extrinsic evidence, in regard to the intention of the testator in such cases, is not very clearly defined. But * there has been manifested a strong tendency to deny, or evade, the presumption itself. In Massachusetts,[100] it is said, "that, prima facie at least, whatever is given in a will is to be intended as a bounty;" and that when a testator says that he makes a gift, it is not to be presumed that he intends thereby to pay a debt, unless the circum-

* [97] Hurst *v.* Beach, 5 Mad. 351.

[98] 2 Wms. Executors, 1173; Hall *v.* Hill, 1 Dru. & War. 94, 113, 114; Lee *v.* Pain, 4 Hare, 201, 216; Palmer *v.* Newell, 20 Beav. 32.

[99] Opinion of *Wigram*, Vice-Chancellor, in Lee *v.* Pain, 4 Hare, 201, 216; Plunkett *v.* Lewis, 3 Hare, 316.

* [100] Strong *v.* Williams, 12 Mass. 391; Smith *v.* Smith, 1 Allen, 129.

stances lead to that conclusion. And in New York,[101] it is declared, that a legacy is not to be taken as a satisfaction of a debt, unless such appears to have been the intention of the testator. And such seems to be the inclination of the American courts upon this question. And it being held there is no such presumption to rebut, it would seem questionable, whether, upon strict principle, extrinsic evidence could be received. But the practice and the inclination of the courts in this country would seem to be in favor of receiving such evidence.[102] But in South Carolina, there is a decision to the contrary.[103] We shall have occasion to recur to this subject, under another head.

48. And as extrinsic evidence is receivable, to rebut prima facie presumptions of trust, it may equally be received to countervail the effect of such evidence.[104] In the case last referred to, the law is thus laid down, by one of the ablest equity judges of modern times, Sir *James Wigram:* "In such cases, the evidence is not admitted on either side for the purpose of proving, in the * first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded." The learned judge here points out a very important distinction, between the admission of extrinsic evidence to show whether an advance was intended to adeem a legacy or not, and the reception of such evidence to show that the testator revoked a legacy. The distinction is very obvious, and one not always sufficiently attended to by writers of acknowledged credit, as here suggested. It is much the same distinction which exists between showing the payment of a note or bill by parol evidence, and showing, by similar evidence, facts tending to contradict or qualify the contract in its inception.[104]

49. But such evidence cannot be received, in support of the

[101] Clark *v.* Bogardus, 12 Wend. 67; s. c. 2 Edw. Ch. 387; Ricketts *v.* Livingston, 2 Johns. Cas. 98.

[102] Fitch *v.* Peckham, 16 Vt. 150; Williams *v.* Crary, 5 Cow. 368; Zeigler *v.* Eckert, 6 Penn. St. 13. See Edelen *v.* Dent, 2 Gill & Johns. 185, where the general rule is elaborately discussed.

[103] Owens *v.* Simpson, 5 Rich. Eq. 405.

[104] Kirk *v.* Eddowes, 3 Hare, 509, 517. See also, White *v.* Williams, 3 Vesey & B. 72.

In a very late case, Parmiter *v.* Parmiter, 1 Johns. & H. 1, parol evidence, to show the intention of the testator that a legacy to his son should operate as a satisfaction of a debt due from him to his son's wife, was held inadmissible.

legal presumption, unless it is first attempted to be impeached, as it would be both illegal and unnecessary; nor can it be received to create a presumption not raised by the law, as this would be to contradict the legal effect of the written instrument.[105]

50. Extrinsic evidence has been admitted to show, that where the testator, by his will, gives all his real and personal estate, equally, among his children, and then provides that the executor shall expend £300 in putting out his son as an apprentice, and the father afterwards expended £200 in putting out his son, as a clerk in the navy, that he intended it as an advancement towards the £300 named in his will, he having died without revoking his will in that respect. And the testator's declarations that such was his intention are competent to be received.[106] And where a legacy is given to one during life, and in the event * of dying without issue is given contingently to another, the legacy will be adeemed by a subsequent gift to the donee without any provision for the one entitled in remainder.[107] In this last case it was held, it might be

* [105] Hall *v.* Hill, 1 D. & War. 94; Lee *v.* Pain, 4 Hare, 216; Palmer *v.* Newell, 20 Beavan, 39. There is an important distinction between admitting extrinsic evidence to rebut an implication of law, like that against double portions, and receiving such evidence to control a presumption of law depending upon the construction of language. Hence, in the very late case of Barrs *v.* Fewkes, 11 Jur. N. S. 669 (1865), Vice-Chancellor *Wood* held, upon extended argument and consideration, that such evidence is not admissible to rebut a presumption arising from the construction of the words of a will simply. Therefore, upon a bequest to the executor of the residuary real and personal estate, "to enable him to carry into effect the purposes of this my will," the court refused to admit extrinsic evidence to show that the executor was entitled beneficially, and was not a trustee merely for the heir of the surplus real estate, the heir being entitled by construction, and not by implication of law. The learned judge said, "The rule applicable to this case is accurately laid down in Coote *v.* Boyd, 2 Br. C. C. 521, 526, where Lord *Thurlow* said, "The question whether, by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption donee probetur in contrarium, and will let in all sorts of evidence. Where the presumption arises from construction of words simply, qua words, no evidence can be admitted."

[106] Rosewell *v.* Bennett, 3 Atk. 77. See also, the following cases, where evidence of intention was received. Chapman *v.* Salt, 2 Vernon, 646; Pile *v.* Pile, 1 Ch. R. 199; Ellison *v.* Cookson, 2 Br. C. C. 307; s. c. 3 id. 61, and other cases in note to 3 Atk. 77.

* [107] Twining *v.* Powell, 2 Coll. 262. The Vice-Chancellor declared that he regarded the question one of some embarrassment, in consequence of the contingent remainder over in the bequest, and no such provision being made in the advance, which was evidently intended to adeem the legacy, to all intents, his honor, there-

shown that the testatrix had placed herself in loco parentis to the legatee, in order to aid the court in giving the proper construction to the will. But in opposition to this there is a considerable array of authority, which seems more in accordance with principle than the cases already adverted to, which are chiefly of an early date. And Mr. Roper, although recognizing the question as not entirely settled, declares himself, very decidedly, in favor of not receiving any direct evidence, extrinsic of the will, to show the testator's intention in giving a legacy, as to whether it shall operate as payment of a preëxisting debt or portion, or the ademption of a former legacy.[108] We shall have to consider this question more in detail hereafter. The weight of English authority appears to be in favor of admitting extrinsic evidence to show the intent of the testator in giving a legacy to a creditor, or child, to whom a portion or legacy had been already secured, and in some other similar cases; but the American courts seem disposed to adhere more strictly to the principle of rejecting extrinsic evidence in all such cases, unless in aid of the construction of the words of the will.

51. Where Mr. Jarman, whose book has acquired almost the weight of authority, says,[109] "No word or phrase in the will can *be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly,[110] much less on that particular occasion,[111] used the words or phrase in a sense peculiar to himself, or even in any general or popular sense as distinguished from its strict and primary import," his language must be accepted with some qualification, or it will seriously impinge upon other rules for the admission of extrinsic evidence, clearly established, and universally recognized. And the learned author's note to this portion of his work shows, clearly, that it was intended to be received in a guarded sense. "Observe," adds the note, "that this position supposes the existence of an appropriate subject or object;

fore, felt bound to act upon such clear intention, and declare the legacy adeemed. See also, Powys *v.* Mansfield, 3 My. & Cr. 359, where this question is still further discussed.

[108] 1 Roper on Legacy, 393, et seq.; Sir *Wm. Grant*, in Hartopp *v.* Hartopp, 17 Vesey, 192.

[109] 1 Jarman, 386 (ed. 1861).

[110] "See per *Parke*, B., Shore *v.* Wilson, 9 Cl. & Fin. 558; Crosley *v.* Clare, 3 Swanst. 320, n."

[111] "Mounsey *v.* Blamire, 4 Russ. 384; Green *v.* Howard, 1 Br. C. C. 31; Strode *v.* Russell, 2 Vernon, 625 Barron *v.* Methold, 1 Jur. N. S. 994."

otherwise it should seem evidence would be admissible, of the testator having commonly described the object (and why not the subject also?) by the terms used in the will." [112]

52. This must bring the matter to the very point of Sir James Wigram's second proposition: [113] Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words, so interpreted, are *sensible with reference to extrinsic circumstances*,[114] it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense, be tendered.[115]

* 53. This proposition is discussed, by the learned author, at far greater length than our limits will allow. Many of the cases bearing upon the question have already been referred to by us, and we shall give a brief abstract of others illustrating the point. The case of Doe d. Brown *v.* Brown [116] is considerably in point. Here the testator devised "all his copyhold estates in North and South Collingwood," and it was held, that as the testator had such estates as were described in his will, it could not be shown by parol that he intended to include, in the devise, a freehold estate, which was intermixed with the copyhold estates in question, and which the testator intended to have pass by the devise, supposing that they were all copyholds, he having before settled the whole upon his wife, specifically enumerating the freehold, but miscalling it copyhold. Nor could it be shown, for the purpose of giving this effect to the devise, that in numerous other documents, affecting the title of these estates, they had all been included under the

[112] Citing Beaumont *v.* Fell, 1 Peere Wms. 425; Douglass *v.* Fellows, Kay, 118.

[113] Wigram, 17.

[114] See per *Coolidge*, J., 9 Cl. & Fin. 525.

[115] See the judgment of Sir *J. L. Knight Bruce*, in Bird *v.* Luckie, 8 Hare, * 301. But, as we have seen, where the words of a will, in their primary sense, are inoperative, in reference to extrinsic circumstances, extrinsic evidence is admissible, to show that the words may have a natural and legitimate operation, in some other sense. Pell *v.* Ball, Spears, Ch. 48. Parol evidence is admissible, to explain a will only, when it would otherwise become wholly inoperative. Whilden *v.* Whilden, Riley, Ch. 205.

[116] 11 East, 441.

denomination of "copyholds." Lord *Ellenborough*, Ch. J., said: "It does not necessarily follow, that he meant to devise to the trustees the *same* premises which he had settled on his wife; or that when he made his will, in 1800, he was under the same mistake, with respect to the tenure of this part of his estate, as he might have been under in 1792, when he made his settlement, or at the date of his rental in 1794. It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent, from extraneous circumstances, to extend plain and unequivocal words in a will." The words of the learned judge make the case as satisfactory * to the mind as any exposition which could be given of it. But it cannot be denied that many other cases, under circumstances almost precisely similar, have been ruled to come under the category of admitting extraneous evidence to define the sense in which the testator had been accustomed to use the words in the will. And where he owned estates in a particular locality, intermingled with each other, chiefly in one tenure, and always designated by that tenure, it seems far more satisfactory to the sense of justice, and equally reconcilable with the strictest principle, to give the terms the import which it is shown the testator was accustomed to give them, although not, technically, quite as accurate.[117]

54. Another leading case [118] upon this subject, seems to involve much the same question as the two last cases referred to. The testator devised his "estate of Ashton." The testator had an estate which he usually called by that name, and the accounts in regard to which were kept in the steward's book, under that name. Part of the estate was situated in Ashton, but it included property in several adjoining parishes. The most unequivocal evidence of intention to pass the entire property under the general name of the "Ashton Estate," was tendered. But the court held, as there was

* [117] Anstee *v.* Nelms, 1 Hurl. & Norman, 225, stated ante, n. 58. This case is very similar to the one last quoted, in the principle involved, and quite analogous in many of its facts, and the extrinsic evidence was received, and the devise construed according to the evident intent of the testator, and, as it seems to us, entirely without any infringement of the nicest technical rules.

[118] Doe d. Oxenden *v.* Chichester, 4 Dow, Ho. Lds. Cas. 65; s. c. 3 Taunt. 147. The case of Hodgson *v.* Merest, 9 Price, 556, is often quoted, as having established the same point. But that case turned mainly upon the the fact, that the requisite formalities had not been complied with, in order to pass the copyhold lands to the devisee.

an estate at Ashton, answering the words of the will, their primary import could not be extended, so as to include the whole property, generally designated * by the testator, as his "Ashton Estate." And the judgment of the Common Pleas was affirmed in the House of Lords.

55. This case seems to be regarded by Mr. Jarman,[119] and by Sir James Wigram,[120] as having settled the principle of law, applicable to all similar questions. But the Common Pleas[121] had been equally devided upon a question, which Mr. Jarman declares precisely similar. And notwithstanding the cases of Doe d. Browne *v.* Greening,[122] and Doe d. Tyrrell *v.* Lyford,[123] and some others, hereafter more particularly referred to, have followed in the same path, as Doe d. *v.* Chichester, supra, it is certainly not a point, by any means clear, upon English authority, that it may not be shown, that an estate called by a certain name, having reference to locality, may pass by such name, although, strictly speaking, all the estate is not within the defined locality. The case of Anstee *v.* Nelms,[124] already referred to, is clearly in favor of allowing such an extension of the name of an estate, to be brought about by the introduction of extrinsic evidence. And in the case of Doe d. Gore *v.* Langton,[125] already referred to, the words "thereunto belonging," were allowed to receive a construction, quite as much beyond their primary import, as it is necessary to give the name of an estate, in order to pass lands beyond the locality named, but, in common parlance, included in the name, which fixes the locality of the whole * estate within that parish or county where it is chiefly, but not wholly, situated.

56. The exposition given by *Bramwell*, B., in Anstee *v.* Nelms, although questioned by Wigram, seems to us entirely unexception-

[119] 1 Jarman, 388.

[120] Wigram, 26.

[121] Whitebread *v.* May, 2 B. & P. 593.

[122] 3 M. & Sel. 171.

[123] 4 M. & Sel. 550.

[124] 1 Hurlst. & Nor. 225. Sir James Wigram, p. 28, says, in regard to this case, that "it is extremely difficult to reconcile" it with the other class of cases. "In either case, there was a subject to which the words of the devise were correctly applicable; in either case, there was room for conjecture, that the testator intended to pass something, to which the words of the devise were not correctly applicable."

[125] 2 Barn. & Ad. 680.

able. "The fact turns out to be, that when the testator made his will, this property was commonly reputed to be in Doynton: What then is the primary signification of the words 'in the parish of Doynton,' 'which shall be proved to be in the parish of Doynton,' or 'commonly reputed to be in Doynton?' I hold the latter to be the natural meaning of the words. The land may have been reputed to have been in Doynton, for five hundred years; but afterwards, on an inquiry being instituted, on reference to Domesday book, or some other ancient or forgotten record, it may turn out to be in another parish." And the language of *Pollock*, Ch. B., here seems to be entirely unexceptionable: "By the gift of land 'in a parish,' the testator means to pass that which he understands — that which is generally understood — to be in the parish. A subsequent discovery of the true parochiality will make no difference; if it were otherwise, a will would mean one thing in 1804, and another in 1855." The reference by Sir James Wigram's editor, to the discovery of the illegitimacy of one who, at the date of the will, was recognized as legitimate, and described as a child of the reputed father, — the testator, and those about him, having lived and died in ignorance of the misfortune, — and saying this, "may surely at any time cause a will to express what, but for such discovery, it would not have expressed," seems to be an unfortunate reply to Ch. B. *Pollock's* illustration. It is clearly a case where the interpretation of the will must be made with reference to the time of execution, rather than the decease of the testator, and therefore has no just bearing on the question.

57. It seems to us, therefore, that the learned judge is manifestly right, and the strictures of this generally accurate writer, for once, are at fault. It could not surely be contended, that if the limits of a parish should be altered, by act of the legislature *(as is very common in America), between the date of the will and the decease of the testator, that this could be allowed to have any effect upon the construction of the will. And the same may be said of the names of persons, and equally of estates, or other matters described in the will. All must be received, as understood, at the date of the will. Any other view would lead to most glaring absurdities, and misconstructions. We submit, therefore, that there is no occasion, whatever, to criticise, or bring in question, the soundness of the decision in the case of Anstee *v.* Nelms. And if the other cases referred to rest upon the same principle, they were not cor-

rectly determined, as it seems to us, and will not ultimately be followed.

58. The only difference which we perceive in the two classes of cases, is, that in one class, the name of the estate was according to the general understanding and common repute of the import of the locality, and in the other, it was a name given to the estate, with reference to the locality, where it was principally situated, and which was in common use by the testator, in that sense, about the time of the date of the will, and well understood by all, who knew enough about the subject, to have any just comprehension of the term, as including the whole estate. It does not seem to us that it can make any difference, in such a case, in regard to the admissibility of extrinsic evidence, to show the sense in which the testator understood or used the term, that he knew it was not strictly accurate, in one case, and in another supposed that it was entirely so; or that he knew in both cases, that the term, as to locality, was not entirely accurate, while others supposed it was; or that others understood the locatity was incorrectly described, and the testator was ignorant of that fact. The material inquiry, in all such cases is, were the terms well understood by the testator, and by those acquainted with the subject-matter, as descriptive of the entire estate? It seems to us, therefore, that both Sir James Wigram and Mr. Jarman, as well as the English courts, have gone beyond the fair import * of their own definitions of the principle involved, in saying that where an estate is known and called by the name of the town or parish where it is *chiefly* situated, but some portion of which is in fact situated in an adjoining town or parish, that the estate shall be divided, and only the portion pass, under the devise, which is, in fact, in the town or parish named. We have already referred to some cases, where a different view has prevailed, and we feel confident that this opinion will constantly gain ground, since it is so reasonable and just in itself, and so strictly in accordance with principle, as it appears to us.

59. The cases which fully illustrate Vice-Chancellor Wigram's second proposition, are all of a different character. As where one gives, in his will, to his children, or to his sons and daughters, and has both legitimate and illegitimate children then living and recognized by him, as children, the latter will be excluded, because the primary signification of the term child, or children, is legitimate offspring. But if the testator has only illegitimate children, whom

he fully recognizes as dependent upon him for support, the words must of necessity have that application, or else become wholly inoperative, a result which courts study to avoid, in all cases, in giving construction to written instruments or documents.[126]

60. In a very recent case,[127] this rule received a very singular * practical illustration. The testator gave a legacy to the "sons and daughters of A. B. living at my death." There were three sons and one daughter of A. B. living at the decease of the testator, one of the sons and the daughter being illegitimate. It was held, the illegitimate daughter took under the will, but the illegitimate son must be excluded. The learned judge, Sir *John Romilly*, M. R., thus concludes his judgment: "The result is necessarily somewhat anomalous, for I admit one of the illegitimate children and exclude the other. It is to be observed, there are two legitimate sons, sufficient to satisfy the word 'sons' in the plural." The judge naturally regretted the decision, but felt obliged to come to it, although contrary to the clear intent of the testator.

61. This seems to exhibit in a strong light the inadequacy of the rule, as one of construction, intended to reach the real intention of the testator. And the anomalous mode of its operation will be still more glaringly exhibited, if we suppose the will in this case to have made the bequest to the children, instead of the sons and daughters, since, in that case, there being two legitimate sons, answering the word "children," in the plural, this must, upon the terms of the rule, exclude both the illegitimate children. It would seem, that a

* [126] Wilkinson *v.* Adam, 1 V. &. B. 422; Woodhouslee *v.* Dalrymple, 2 Mer. 419; Beachcroft *v.* Beachcroft, 1 Mad. 430; Bailey *v.* Snelham, 1 Sim. & Stu. 78; Earl of Orford *v.* Churchill, 3 V. & B. 59; Pratt *v.* Mathew, 22 Beav. 328; Swaine *v.* Kennerley, 1 V. & B. 469; Cartwright *v.* Vaudry, 5 Vesey, 530; Geoffrey *v.* Davis, 6 Vesey, 43.

[12] Edmunds *v.* Fessey, 7 Jur. N. S. 282, stated ante, n. 12. How far illegitimate children, or their children, shall take by general description, where there are no legitimate children to answer the words of the will, seems mainly a question of intention. Allen *v.* Webster, 6 Jur. N. S. 574. But illegitimate children, born after the date of the will, cannot take by general description, as such other children of my housekeeper, &c. Medworth *v.* Pope, 5 Jur. N. S. 996. This question is * further illustrated In re Herbert, 6 Jur. N. S. 1027, where it was held, that to enable illegitimate children to take under a bequest to a class, e.g. — to daughters — . there must be evidence that no other persons would answer the description, and that they, in their reputed character, did answer it, and that the testator was aware of these facts; and the testator's knowledge will not be presumed, without evidence. There must be some evidence tending to show the knowledge.

rule of construction, liable to such singular misapplications, which would occur to no one but an expert in the law, and might very often escape the recollection of those most experienced in such matters, as every one must have observed the far greater difficulty of remembering accurately a rule of law, which is unnatural and * against reason and justice, than one of the contrary character; it would seem, that such a rule of construction ought to be reformed by the legislature, if it cannot be by the courts. We question whether such applications of the rule, notwithstanding its general recognition, would ever be tolerated in the American courts. There was in this case a very ready and natural path for escape. The fact that the testator clearly referred to the natural daughter, as one of the children, was proof, satisfactory to all minds, that he must have intended to include legitimate and illegitimate sons under the general name, since, in regard to the daughter, he evidently made no distinction between the two classes. This point was in effect decided by Vice-Chancellor *Wood*,[128] within the last few years. The testtator having named the son of his illegitimate son, as his grandson, it was held this, by implication, made the daughter of that same son a grandchild.[128] This subject will be further discussed elsewhere.

62. And the application of the same rule is made to the devise of "my real estate." So that property which the testator holds only in trust, or subject to a power, shall not pass, unless where the testator had no real estate except that, and the devise must be held nugatory, unless allowed to operate in that mode,[129] seems to be a fair illustration of the rule. But the same rule of construction has not been applied to personal estate, held under a power, since a bequest of personal estate may operate upon property subsequently acquired, and thus receive a sensible construction, as having been intended to have that application, notwithstanding the testator had no other personal property at the date of his will, except that held under the power.[130]

* [128] Allen *v.* Webster, 6 Jur. N. S. 574. S. P. Heater *v.* Van Auken, 1 M'Carter, 159.

[129] Lewis *v.* Llewellyn, 1 Turn. & Russ. 104; Denn *v.* Roake, 5 B. & Cr. 720; Hoste *v.* Blackman, 6 Madd. 190; Doe d. Caldecot *v.* Johnson, 7 Man. & Gr. 1047.

[130] Jones *v.* Tucker, 2 Mer. 533; Andrews *v.* Emmot, 2 Br. C. C. 297; * Nannock *v.* Horton, 7 Vesey, 391; Andrews *v.* Lemon, cited 4 Dow, 90; Jones *v.*

* 63. And the strict application of the relative terms son, child, grandchild, nephew, niece, &c., wherever there exist persons well known to the testator fully answering the primary signification of the terms, is not unreasonable.[131] In a recent case,[132] before the Lord Chancellor, after a good deal of examination and discussion at the bar, it was held, that a bequest to "cousins," simpliciter, includes first cousins only, in the absence of any thing to explain the meaning of the testator. His Lordship said: "I think that if a testator says no more than that he gives to "cousins," he must be taken to mean first cousins. That will be a practical construction, and one by which the parties entitled will be easily ascertained: it coincides, too, with ordinary experience, for when a person speaks of cousins, he generally means first cousins, the children of an uncle or aunt; and I think that in the present case, there being first cousins, this is the proper construction to adopt." This exposition of the subject seems extremely reasonable, where there is nothing in the will which, with reference to extraneous circumstances, seems fairly to indicate a different intention in the testator.

64. All that is intended by the rule is, that where the words of the will, with reference to all extrinsic evidence showing the state of the subject-matter, and the condition of the surrounding facts, including the state of the testator's family, and of others to whom his bounty is intended, do not indicate any * purpose of extending these relative terms beyond their strict and primary signification, this cannot be done, by way of construction, upon mere conjecture, nor can independent extrinsic evidence be received, to show, by facts having no connection with the words of the will, that the testator intended to include others in these general terms not coming strictly within the primary import of the words. But if there is any thing fairly to indicate, with reference

Curry, 1 Swanst. 66; Webb *v.* Honnor, 1 Jac. & W. 352; Dover *v.* Alexander, 2 Hare, 285; Davis *v.* Thorms, 3 De G. & Sm. 347; Lowell *v.* Knight, 3 Sim. 275; S. C. 5 Sim. 166; Dummer *v.* Pitcher, 2 My. & K. 277; Lempriere *v.* Valpy, 5 Sim. 108; Evans *v.* Evans, 23 Beav. 1; Shelford *v.* Acland, 23 Beav. 10.

[131] Royle *v.* Hamilton, 4 Vesey, 437; Reeves *v.* Brymer, id. 692, 698; Radcliffe *v.* Buckley, 10 Vesey, 195; Shelley *v.* Bryer, Jac. 207; Hart *v.* Dusand, 1 Anst. 684; Corporation of Bridgenorth *v.* Collins, 15 Sim. 541; Smith *v.* Lidiard, 3 Kay & J. 252; Crook *v.* Whitley, 7 De G., M. & G. 490.

[132] Stoddart *v.* Nelson, 6 De G., M. & G. 68.

to external facts, that such was the intent of the testator, courts will generally give that construction, as being most in conformity with the probable purpose of the testator, and the general sense of justice. The case of Gill *v.* Shelley,[133] is an illustration of what is here intended. The testator's will contained a contingent provision for the "children of the late Mary Gladman." She had one legitimate and one illegitimate child, both well known to the testatrix, and both equally objects of her bounty during her life. The court considered that the term "children" sufficiently indicated more than one, and that could not be met but by including the illegitimate child, as well as the other. But there was something *in the will* to enable the court to give the term this extended import. The difficulty in many of this class of cases has been to find enough in the will to justify the court in extending the import of the term, so as to cover the apparent intent of the testator. So also where the testator gave to his son the perpetual advowson of H. B., the son at the time being the incumbent of the living, it was claimed, the son being in for life, by the presentation of his father, the devisee must take the fee of the advowson, or the will would have no operation.[134] But the majority of the court held, that only a life-interest passed under the will, the devise, even in that view, * going to enlarge the interest of the devisee, inasmuch as he might vacate the living, for the benefit of any one he should name, and if he were preferred to some higher ecclesiastical place, he would then have the right of presentation to the living thus vacated. *Parke*, J., who dissented from the decision, said: "Many words, which will not carry a fee in a deed, will carry it in a will, if the words used in the devise can be shown to be sufficient to indicate that intention in the testator." The learned judge also referred to the introductory part of the will, wherein the testator declares the purpose of disposing of "*all his worldly goods*," and also to two cases wherein eminent judges made some reliance upon such an introductory declaration.[135] We have presented the language of Lord

* [133] 2 Russell & My. 336.

[134] Pocock *v.* The bishop of Lincoln, 3 Br. & B. 27. It was considered that the word "perpetual" had reference to the quality of the living, and not to the estate devised.

* [135] Doe d. Bates *v.* Clayton, 8 East, 141, where Lord *Ellenborough* says: "This construction may be considered as in a degree aided by the introductory words of the will respecting his worldly and temporal estate." And in Doe d.

Ellenborough in the note, as tending to show upon what slight grounds, judges, of the greatest wisdom, and the most enlarged experience, have felt justified in construing almost any word, in any part of the will, as sufficient to justify an enlarged construction of the general phraseology of the instrument, so as to reach the obvious purpose and intent of the testator.

65. The authorities are reviewed, somewhat extensively, by Vice-Chancellor *Wigram*, in the case of Dover *v.* Alexander,[136] * as bearing upon this point. The case, in itself, presents an instance of marked character, wherein general rules may work serious injustice. The testatrix having several legitimate children, and one illegitimate child, and being separated from her husband, and enciente of another illegitimate child, appointed a fund to her illegitimate child, then born, reserving a power of revocation, as to a moiety, "in favor of any after-born children she might have born of her body." After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund, between the two illegitimate children. It was held, that the after-born children, for whose benefit the revocation might be made, must be taken in the primary and legal sense, as applying to legitimate children only; that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment. There is, undoubtedly, in addition to the uncertainty of the use of the term "child," for illegitimate offspring, a principle of policy involved, against allowing any intendment, by way of construction, in favor of a provision for after-born children being applied in behalf of illegitimate offspring. It seems clear, upon the authorities, that there is no difference, in the import of the world "child," as comprehending illegitimate offspring, when applied relatively to parents of different sexes. And it was

Wall *v.* Langlands, 14 East, 370, the same learned judge says: "Very little inference of intention can be drawn from mere formal words of introduction; though we certainly find them, in some cases, called in aid, to show that a man did not mean to die intestate, as to any part of his property, and the making a will at all may also be used, as affording such an inference." See also, Barnacle *v.* Nightingale, 14 Sim. 456; Yates *v.* Maddaw 3 Mac. & Gor. 532.

[136] 2 Hare, 275. The opinion of the learned judge is of such weight, both for its inherent force, and the accidental weight of its authority, that we should be glad to give it here as the fairest and ablest commentary we could present. But our space is so much occupied, that we must refer to the report.

here considered, that the addition of the terms, "born of her body, but not otherwise," could make no difference.[137]

66. The American authorities, upon this point, are very numerous, and take the same general view of the question, with the English cases, which we shall have occasion to refer to more in detail in another place.[138]

* 67. In a case[139] tried before Sir *John Leach*, Master of the Rolls, in 1828, the testatrix devised her real estate to one she described as her "kinsman," who was not her heir at law, but whom she directed to assume her name and arms, and by a codicil she gave several pecuniary legacies, and amongst others, "to her heir, £4,000." At her death, three persons were her co-heirs, and the question in the case was, whether the heirs at law, the next of kin, or the devisee, who claimed as *hæres factus*, should take the legacy. Evidence was offered to explain this, as a latent ambiguity, but the Master of the Rolls rejected the evidence, holding, that the word "heir," was to be taken as nomen collectivum, and would legally include all those who filled that character.

68. In re Davenport's Trusts,[140] the testator made a provision for his nephew, for life, and in case of his decease, if his wife survived him, the dividends to be paid to her during life, and after the decease of both, to be divided among his children. The nephew deceased, a bachelor, leaving five children of one M. with whom he had cohabited from before the date of the will until his decease. Evidence was tendered, showing that the testator was in habits of correspondence with his nephew, and that he must have known he was living with the mother of the children, as his wife; that she was generally recognized in the family, as his wife, and that the testator frequently alluded to his nephew, as having a wife and children. It was argued, in favor of the mother of the children, that there could be no doubt the testator believed her to have been the wife of his nephew, and made the bequest to her in that character, by way of description, and that, as she had not assumed this false character, voluntarily, with the purpose of deceiving the testator,

* [137] Wilkinson *v.* Adam, 1 Ves. & B. 446; Mortimer *v.* West, 3 Russ. 375.

[138] Cromer *v.* Pinckney, 3 Barb. Ch. 446; Hone *v.* Van Schaick, 3 Barb. Ch. 488; Collins *v.* Hoxie, 9 Paige, 81; Mowatt *v.* Carow, 7 id. 328; Gardiner *v.* Heyer, 2 Paige, 11; Kent *v.* Barker, 2 Gray, 535.

[139] Mounsey *v.* Blamire, 4 Russ. 384.

[140] 1 Sm. & Gif. 126; Pratt *v.* Mathew, 22 Beav. 328.

she was entitled to the legacy by this description, by way of common reputation. It was admitted, at the bar, that the claim in * behalf of the children could not be supported. Vice-Chancellor *Stuart* was of opinion, that the evidence did not show that the testator was so far personally acquainted with his nephew's mode of life, that he must be considered as having reference to the woman, with whom he lived, and as describing her by the word "wife;" but that he merely indicated, any woman, who survived him, and had been his wife; and that if he had been legally married to any other woman, after the date of the will, who survived him, she would clearly have been entitled, under the will, and rejected the claim.

69. We can give but a brief synopsis of some few of the American cases upon the question discussed in this section, and in doing this we shall only repeat the same propositions already stated, with referrence to the English decisions. In New York, it has been often declared, as we have seen, that the intention of the testator is to be gathered from the words of the will.[141] But a will may be construed in connection with another written instrument to which it refers.[142]

70. Extrinsic evidence, it has often been held, in this state, is not admissible to control, or influence, the construction of a will, when such construction is based upon clear language, and well-settled rules.[143] But the construction of a will may be aided by extrinsic, collateral circumstances, such as might be supposed to influence the testator's mind at the time of making the will.[144]

[141] Mann *v.* Mann, 1 Johns. Ch. 231; s. c. 14 Johns. 1, affirmed in Court of Errors; Jackson *v.* Luquere, 5 Cow. 221; Arcularius *v.* Geisenhainer, 3 Bradf. Sur. Rep. 64; Sweet *v.* The same, id. 114; ante, § 37, pl. 9, n. 14.

[142] Jackson *v.* Babcock, 12, Johns. 389.

[143] Bunner *v.* Storm, 1 Sandf. Ch. 357; Mann *v.* Mann, 14 Johns. 1; s. c. 1 Johns. Ch. 231.

[144] Wolfe *v.* Van Nostrand, 2 Comst. 436; Ellis *v.* Essex Merrimack Bridge Co. 2 Pick. 243; Braman *v.* Stiles, id. 460. Circumstances extrinsic of the will are often received, whereon to found presumption of intention. Williams *v.* Crary, 4 Wend. 443; 14 Ga. 370. The intention of the testator is to be looked for, with reference to the date of the will. Maupin *v.* Goodloe, 6 Monr. 399. The situation and circumstances of the testator as to his property and family, are always to be taken into the account. Morton *v.* Perry, 1 Met. 446, 449. And the other provisions of the will and the reasonableness of the different constructions claimed; ib.; Jarvis *v.* Buttrick, 1 Met. 480, 483. And all courts receive evidence of the amount and value of the different portions of the testator's property, and of the

* 71. The introductory words of a will, it has been said, may have some effect upon the provisions contained in the body of * the instrument.[145] But such words cannot be allowed to operate to enlarge a devise, unless in some way connected with such devise.[146]

72. But it has been held, that evidence of the testator's intention may be resorted to for the purpose of determining whether an equivocal instrument shall operate as a deed or a will.[147] This will depend upon the peculiar circumstances of the case, undoubtedly, but in general we should not apprehend, that an instrument of this

circumstances of the testator's family, known to him, with a view to fix the proper construction upon the words of the will. Morton *v.* Perry, supra; Marshall's Appeal, 2 Barr, 388; Stoner & Barr's Appeal, 2 Barr, 428; Mason *v.* Mason, 2 Sandf. Ch. 432; and the character of the subject devised may be shown. Nichols *v.* Lewis, 15 Conn. 137; Morton *v.* Edwards, 4 Dev. 507. Extrinsic evidence must be received in all cases, to define the extent of the subject-matter intended to be included under general terms, but not to enlarge or vary the extent and meaning of the terms used. Spencer *v.* Higgins, 22 Conn. 521. It is said, the court will put themselves in place of testator, where the will is doubtful, but not when it is plain. Perry *v.* Hunter, 2 R. I. 80, the import of which must be, that, in the former case, it will become necessary to do so, in order to determine the true purpose of the will, but not in the latter. The same language is used in other cases. Brearley *v.* Brearley, 1 Stockt. Ch. 21. But it is always considered that the knowledge of the circumstances surrounding the testator at the time of making his will, afford important aid in determining its true import, and will be looked to in all cases of doubt. Rewalt *v.* Ulrich, 23 Penn. St. 388; Wotton *v.* Redd, 12 Gratt. 196. But in this last case the familiar principle, that the declarations of the testator cannot be received, to show his intention, even when made at the time of making his will, was declared. And it has often been decided, that testimony in any form to show an intention of the testator different from that indicated by the words of the will, cannot avail. Brown *v.* Saltonstall, 3 Met. 423; Long *v.* Duvall, 6 B. Monr. 219. Extrinsic evidence cannot be received to add to or subtract from or modify the fair import of the words of the will; but it must be resorted to for the purpose of identifying things described. Kinsey *v.* Rhem, 2 Ired. 192. And it is not admissible to show that the testator had contemplated a different disposition of his property, with any view to alter the legal construction of the instrument. Stephen *v.* Walker, 8 B. Monr. 600. And it is not competent to prove that a child has not received advancements, as stated in the will, with any view to enlarge the provision made for such child by the will. Painter *v.* Painter, 18 Ohio, 247. Some of these cases have been before referred to, where the same point arose in another form.

[145] Earl *v.* Grim, 1 Johns. Ch. 494.

[146] Barheydt *v.* Barheydt, 20 Wend. 576, in Court of Errors; Van Derzee *v.* Van Derzee, 30 Barb. 331.

[147] Robertson *v.* Dunn, 2 Murphy, 133.

equivocal character is any more liable to be controlled in its legal operation, by extrinsic evidence, than any other.

73. The question of the admissibility of parol evidence to rebut legal presumptions, is extensively, and, to our apprehension, lucidly discussed, in a late case in New Hampshire,[148] by *Bell*, Ch. J., and the rule declared, that no presumption is liable to be so disproved, unless it be of the character of presumptions of fact, which the court make upon grounds of probability, or experience, in the absence of express proof, that the rule does not apply to such legal presumptions, as are denominated in the Civil Law, presumptiones juris et de jure, but to mere prima facie, or disputable presumptions, in which contradictory evidence is admissible, denominated in the Civil Law, from which the ecclesiastical and equity courts derive this rule, presumptio juris.

74. But it seems clear, that a bequest for a person, natural or corporate, which has an existence, or which has had such existence within any such reasonable time as probably to have been in the mind of the testator when he executed his will, cannot be allowed to go to any other person, upon the ground that it was really intended for such other person but which is neither described by name, or in any other manner.[149] So a bequest of all money due me at the time of my decease, from the "Dedham Bank," there being such an institution, cannot be applied to another institution, called the "Dedham Savings Bank," in which the testator had money at his decease; he never having had any in the former.[150]

[148] Loring *v.* Woodward, 41 N. H. 391. It was here decided, that as a matter of legal construction, the income of specific legacies goes to the legatee, without reference to the time of delivery of the article, and that parol evidence is not admissible to show the intention of the testator, as to the income of such legacies, where the will is silent. It is said, in a still later case in this state, that where there is no latent ambiguity in a devise, parol evidence of the intention of the testator is inadmissible. Brown *v.* Brown, 43 N. H. 17.

[149] Bliss *v.* American Bible Society, 2 Allen, 334.

[150] American Bible Society *v.* Pratt, 9 Allen, 109. This question is here very carefully considered and clearly presented by Mr. Justice *Metcalf*.

*CHAPTER XI.

UNCERTAINTY IN WILLS.

SECTION I.

BEQUESTS OR TRUSTS VOID FOR UNCERTAINTY.

1. The difficulties of the subject stated with reference to courts, and to cases.
2. The earlier cases upon the subject not reliable, unless reaffirmed by later ones.
n. 3. Mr. Jarman's rule upon the subject.
3. Extremes should be avoided, as to certainty, in defeating, or upholding wills.
4. Where a bequest is made to one by name, and there are two of the name.
5. Where the amount is wholly indefinite, the bequest must fail.
6. But this uncertainty is commonly removed by referring to the purpose of the testator.
7. And some indefiniteness of terms may be disregarded, as an approximation.
8. Bequests not avoided because differently stated in different parts of will.
9. Uncertainty in the subject-matter to avoid a will, must leave it mere conjecture.
10. The case of Henry *v.* Hancock, in the House of Lords, discussed.
11. Arbitrary rule adopted, to avoid uncertainty.
12. Devise of a portion of estate, by acres, not separated from a large field, not void.
13. Bequests of part of a larger quantity, gives the election to the legatee, or devisee.
14. The gift of such as the legatee may select, implies that the whole is not given.
15. Where an exception is so indefinite as to be unintelligible, it is void, and the whole passes.
16. The bequest of *that* vested in *a* mortgage will carry all invested, in several mortages.
17. A gift to the legatee not excluding a given sum, includes that sum.
18. A bequest of personal estate must be precise and definite, to create a trust over.
19. Enumeration of indefinite expressions in will, not sufficient to create trusts.
n. 35. Enumeration and analysis of the cases upon this point.
20. Gifts of personal estate for life with remainder over, perfectly valid.
21. Gift of what shall remain, with a power of appropriation, means what is unappropriated.
*22. Bequest of the income of a fund with power to apply the capital, is valid
23. Questions of repugnancy in wills often more matter of construction than of necessity.
24. Bequests in trust for the life of another, being discharged, the heir entitled to surplus.

25. Devise of all, with a defined exception depending upon condition not performed, will pass all.
26. But a gift in parcels depending upon each other, will wholly fail, if the parts cannot be ascertained.
27. A bequest of all, after certain illegal expenditures, never ascertained, must fail.
28. But where the prior expenditure is capable of ascertainment, it will be done.
29. Where all of a fund is given in unascertained proportions, these may be determined.
30. And the indefiniteness of other funds to be created will not affect a definite legacy.
31. A bequest rendered uncertain, by double application, explainable by extrinsic evidence.
32. But a bequest uncertain upon its face cannot be so explained. Illustration.
33. Where the bequest includes all of a class, with an undefined exception, all will take.
34. Instance of uncertainty which will avoid bequest.
35. Bequest to persons, or classes, in the alternative, void, unless uncertainty removed by construction.
36. Reference to extraneous facts may leave the bequest to mere conjecture, and void.
37. Bequest to several in succession, the order of succession will be determined by construction.
38. Charitable bequests will not fail by reason of the uncertainty of the object.
39. How far inaccuracy of one or more particulars of the description will avoid a bequest.
40. Same rule applies to errors in description of the subject as of the object of a devise.
41. The name of a devisee being correct, will, in general, control the matter.
42. But the certainty in the name must be sufficient to remove the uncertainty of description.
43. And where the name is imperfect, or erroneous, description may remove uncertainty.
44. This has been carried so far as to reject one name and substitute another.
45. Some extreme cases occur where description supersedes the name.
46. Where the name and description both fail to identify the devisee, the devise void.
47. But where the description is supported by circumstances, it controls the name.
48. The will must be incapable of any clear meaning, to be held void for uncertainty.
49. Mere error or defect in name, or description, not sufficient.
50. In America uncertainty will not avoid will, unless it leave it to mere conjecture.
51. A very indefinite bequest to charity recently sustained.

*§ 42. 1. THE subject of uncertainty in wills has been incidentally alluded to in many of the preceding chapters,[1] but it seems requisite to devote some space specifically to that topic. We cannot forbear to say, in limine, that this is one of those subjects where the decisions are so much affected by peculiar circumstances, that one case will afford very little aid in determining another, not very similar in its state of facts. We think, too, that this class of cases,

*[1] Ante, § 32.

when not coming within any precise rule, or exception, connected with the subject, is liable to be determined, very much upon the taste or the whim of the court. One judge will be so much impressed with the importance of making every will intelligible, and allowing no obstacle to defeat the purpose of the testator, that he will always find some way of escape from all perplexities of the kind. Another will dwell so much upon the importance of keeping all exposition within the range of the words of the will, that he will often allow uncertainties, which embarrass no one but himself, to mystify and obscure his perception, to such an extent, that his decisions will often seem to partake more of the character of ingenious doubts, than of sound expositions of the best mode of escaping doubts.[2]

2. We shall not attempt to analyze and classify the early cases upon this subject, except as they have been recognized in * the later decisions, in support of some general rule of construction, affecting the question of the degree of uncertainty which will render a testament void.[3] We agree fully with the leading proposition contained in Mr. Jarman's testimony on this point,[3] but we believe the first reason, assigned by him for the result, has very little to do

[2] 1 Jarman, ed. 1861, 330, et seq. This very sensible writer dwells very much at length upon the favorable construction which wills have received, out of deference to the ignorance and inexperience of testators who often attempt, either to make, or alter their wills. Citing, 3 Keble, pl. 23, 49; Henniker *v.* Henniker, 12 Jur. 618; Baker *v.* Newton, 2 Beav. 112; Langley *v.* Thomas, 6 De G., M. & G. 645. In the case of Baker *v.* Newton, the M. R., Lord *Langdale*, held the bequest void for uncertainty, when it would seem not very difficult to conjecture what the testator must have intended. And in Langley *v.* Thomas, although the V. Ch. *Stuart*, and the Lord Chancellor, *Cranworth*, held precisely opposite views of the meaning of the testator, the will was upheld by both of them, upon their differing theories. These cases will illustrate our meaning in what we have said in the text.

[*3] 1 Jarman, ed. 1861, 331. This reliable writer here says, "In modern times, instances of testamentary gifts being rendered void for uncertainty, are of less frequent occurrence than formerly, which is owing, probably, in part to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases, once considered vague, and insensible, and in part to the more practical skill of courts, in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases, in which a gift has been held to be void for uncertainty, the principle whereof has not been recognized in later times." Citing Pride *v.* Atwicke, 1 Keb. 692, 754, 773; Price *v.* Warren, Skinner, 266; Eq. Cas. A b, 356, pl. 2.

with it, and that the chief reason why courts, in the later cases, have felt reluctant to admit uncertainty as a ground of avoiding the formal disposition of property, will be found in the very general feeling in all judicial tribunals, whether in this country or in England, that the earlier decisions upon this point, were, many of them, unreasonable and indefensible, and not a few of them verging very closely upon the ludicrous and the absurd. The consequence of this conviction has been, that in some instances there has been manifested a disposition to press towards the opposite extreme, and instead of yielding to slight grounds of doubt and uncertainty, there may be some cases found, where the courts seem to have supplied the most important provisions in wills, upon grounds little short of mere conjecture, and, by supplying defects and altering the arrangement of the materials, rather to have made a new testament for the party, than to have given an allowable construction to one already in existence.

3. We should certainly not feel disposed to encourage the adoption of either extreme. But we believe it will be found, * that in very few cases are wills so defective and confused as to be incapable of being brought into harmony, and intelligible meaning, by fair and allowable construction, within the ordinary range of judicial administration; and that it is the duty of courts to uphold every contract, and especially, every instrument of a testamentary character, where the thing can fairly be done, and that it is little creditable to courts to evade just responsibility, in such cases, by shielding themselves behind some antiquated case, which might seem to justify a decision against its validity, on the ground of uncertainty; when, at the same time, every member of the court was convinced, from the words of the will, what the testator must have intended; and that he could have meant nothing else. And we should at the same time deprecate that latitudinarian mode of construction, whereby courts have attempted to bridge over every chasm in the language, however broad and incomprehensible, by a lawless resort to conjecture, based upon no recognized canons of construction; or what is still more objectionable, if possible, by an utter disregard of the natural and ordinary meaning of the words used, and guided only by that undefined light, of extrinsic circumstances, in no just sense admissible in aid of the legal construction of the instrument.[4]

* [4] The case of Bowman *v.* Milbanke, T. Ray. 97, shows upon how slight grounds

* 4. It is laid down by Swinburne,[5] that a bequest to any person by name, where there are two persons by the same name, and no means of determining which was intended, the bequest must be held wholly void; and we do not perceive any ground of escape from such a result, where there is no ground whatever, either in the proof, or the circumstances, to incline us to believe that the testator meant one of the persons of that name more than the other. But we conjecture that such a case would never occur.

5. So, too, if the testator give an entirely indefinite amount of property, as "*some* of my best linen,"[6] or "a handsome gratuity to each of my executors,"[7] it has been held a void bequest. But in the former case Sir *Joseph Jekyl*, M. R., in the decretal order, recommended the residuary legatee, "since it was plain the testatrix intended some linen," "to give some of the best of the testatrix's linen to the legatees." But in the latter case, Sir *L. Shadwell*, V. C., said, "I shall not give any such recommendation," "as I do not think I am at liberty to do so," which seems very certain, unless the judge could define the amount.

6. But in later cases, under the administration of the more

courts have sometimes doubted. The words of the bequest found by the special verdict were, "I give all to mother, all to my mother," and it was held, lands did not pass, as it was wholly doubtful and uncertain to what the word "all" referred. 1 Lev. 130; Sid. 191; 1 Jarman, 331. It may be uncertain what is included under the word "all." That must be determined by proof of what the testator had, but it is certain, by such a form of expression, twice uttered, he could scarcely mean less than he said, "all," "all." Almost any one, unless it were an equity judge; some disciple, perhaps, of the great prince of doubters, Lord *Eldon*, would find it difficult to raise a doubt in such a case; and if he could succeed in conjecturing different meanings which the testator might have had, we believe a delicate man would feel some reluctance at the expression of such doubts, unless they rested upon grounds more substantial than any which now occur to us. A somewhat similar case, but one of more uncertainty, is that of Mohun *v.* Mohun, 1 Sw. 201, where the testator gave to all his grandchildren, "share and share alike," without saying what he gave. It is pretty obvious he must have intended all the residue of his estate, not otherwise specially disposed of, but the court resisted this interpretation upon the ground that it required an unauthorized transposition of the words, which it has been held is not admissible, except upon clear grounds. Ante, § 33.

[5] Swinb. on Wills, pt. vii. § viii. pl. 1, 2, 3, 4, where the circumstances which may determine the point are enumerated. Richardson *v.* Watson, 4 B. & Ad. 798.

[6] Peck *v.* Halsey, 2 P. Wms. 387.

[7] Jubber *v.* Jubber, 9 Sim. 503.

learned and experienced equity judges, many bequests of this general and indefinite character have been rendered sufficiently * certain to be carried into effect, by looking carefully into the general purpose in the mind of the testator, and which he desired to accomplish by the provisions of his will. Thus, where the testator desired his executors to retain a sufficient sum of money to remunerate them for their trouble, it was referred to the Master to state the amount which would be a reasonable compensation for the service.[8] And the same course has been pursued where the provision was expressed to be for the support and maintenance of a person, either in whole or in part. This is a matter easily susceptible of estimation, with reference to the circumstances and condition of the person.[9] And even where a provision is made for the support of a widow, by means of the income of the residue of the estate, and "in case any thing should occur that her income is not sufficient, she shall be at liberty to go to the principal," the income of the residue proving insufficient, it was held, the widow could only go to the corpus of the fund to make up the deficiency, so as to produce an amount "sufficient to afford her a maintenance suitable to her station in life, and that this appeared to be about £60 a year, clear of every thing." [10]

7. And a bequest for accumulation,[11] until the interest shall * amount to "£3,000, or thereabouts," although extending beyond the limits of the law rendering bequests void for remoteness, is nevertheless valid, within the legal limits for accumulation, and not void for uncertainty, the terms of the bequest leaving nothing

[8] Jackson *v.* Hamilton, 3 J. & La Touche, Irish. Eq. Temp. Sir *Ed. Sugden*, 702.

[9] Broad *v.* Bevan, 1 Russ. 511, n.; Pride *v.* Fooks, 2 Beavan, 430. It was here held, that the provision for the maintenance of a daughter did not cease upon marriage until twenty-one; and a provision for trustees, expending money for the advancement of such a child, extended beyond the period of marriage and majority. See also, Kilvington *v.* Gray, 10 Sim. 293; Batt *v.* Annes, 11 L. J. Ch. 52; Thorp *v.* Owen, 2 Hare, 610.

[10] Sir *John Romilly*, M. R., in Re Pedrotti's Will, 27 Beavan, 583. The counsel for the widow here claimed the whole fund, and cited Methold *v.* Turner, 4 De G. & Sm. 249; Rudland *v.* Crozier, 2 De Gex & Jones, 143; Cowman *v.* Harrison, 10 Hare, 234.

[11] Oddie *v.* Brown, 4 De Gex & Jones, 179, before the Lord Chancellor and the Lords Justices. The counsel, in favor of maintaining the bequest, cited, upon the question of certainty, Seale *v.* Seale, 1 P. Wms. 290, and those * opposed relied upon Cherry *v.* Mott, 1 My. & Cr. 123.

uncertain, except to bring the accumulation as near £3,000 as it could be done, by the combination of even dividends.[12]

8. And a bequest is not held void for uncertainty, because it is differently stated, as to the amount, in different portions of the will; as where in one part of the will it is called £30,000, and in other parts of it £20,000; if from the whole will it can be determined, with reasonable certainty, which sum was really intended by the testator.[13]

9. After an examination of the cases, to a considerable extent, it was held, that a devise of land, "which I purchased, lying on the main, supposed to be in the state of Vermont," it appearing that the testator owned one right of land, in the township of Burlington, in the state of Vermont, was not void for uncertainty.[14] The court here say, "A devise or grant is only declared void for uncertainty, when, after the resort to oral proof, it still remains mere matter of conjecture what was intended by the instrument."

10. There is one case[15] where the subject of uncertainty in a

[12] 1 Jarman, 332.

[13] Philipps *v.* Chamberlaine, 4 Vesey, 50; Mellish *v.* Mellish, id. 45.

[14] Townsend *v.* Downer, 23 Vt. 225.

[15] Jones d. Henry *v.* Hancock, 4 Dow, 145. The devise over was no more uncertain than the provision for the daughter. Both depended upon contingencies, and some degree of uncertainty, even after the contingency of the marriage was determined. It was then the same as if the testator had given his daughter an amount equal to the estate of her husband, or equal to the estate of any other man named. This may certainly be regarded as a somewhat indefinite measure of quantity, but there is no uncertainty whatever in regard to the intention of the testator. The uncertainty is dependent wholly upon the indefiniteness of the measure adopted by the testator. But this is entirely dependent upon circumstances. A man's estate may be the most indefinite thing in the world, or it may be as certain as figures can make it. It may consist wholly of public stocks, standing in his name in the Bank of England. And is it proper to characterize such a devise as uncertain, merely because the amount is not expressed in words upon the face of the will? If that were so, every devise which refers to extraneous facts, to render it certain, would, for that reason, be held void, which no one could well claim in regard to any written instrument. In late years, certainly, it is the practice of courts to overcome all such mere indefiniteness of description, by reference to some appropriate tribunal, to determine the facts, which may be done by approximation, at least, as it has to be in the majority of cases upon all subjects. It would hardly be claimed, at the present day, that a legacy, equal to what property a man's sons should severally have accumulated, at the age of thirty, to be paid upon arriving at that age, respectively, would be void for uncertainty. And if not, the gift of the residue would be no more so, except as it depends upon the double, or as it might be, the tenfold uncertainty of the amount of the testator's

* will is very much discussed, and where it seems to us the decision of the House of Lords should be regarded as questionable. The testator devised lands to his daughter, in tail, upon condition she married a man of property, at least equal to that left her by the testator, and if she should marry a man with less than that, "I leave her only as much of mine as shall be equal to the property of the man she marries," and the remainder, it * was provided, should, in that event, immediately go to others named. It was held that the devise over was void for uncertainty.

11. Courts have sometimes resorted to an arbitrary rule of construction, in order to save avoiding a bequest for indefiniteness, as, in the case of a devise to two persons, in such proportions as ——— shall determine, it has been held to create a tenancy in common, in equal shares, the same as if nothing had been said of the mode of determining the shares, leaving it in that defective form really amounting to nothing.[16] And upon the same principle an equal division is made, where the donee of a power of distribution fails to exercise the power.[17] And so also, where an estate is conveyed to trustees for the benefit of the testator's eldest son, but so that the younger children of the testator may participate with their elder brother, and that their mother should also participate with him in the same, and that this request of the testator might be particularly observed; but the proportion, or mode of the participation, was not in any other mode defined. It was held, that a valid trust was thereby created, in favor of the younger children, to participate as tenants in common in equal proportions.[18]

estate, and that of his sons also. If a bequest is to be declared void, for uncertainty, because it depends upon the amount of another man's estate, a residuary bequest ought, upon the same principle, to be regarded as void, for that depends, not only upon the uncertainty of the testator's property, but upon many other contingencies. It seems to us that the case of Jones d. *v.* Hancock, supra, does not involve any such uncertainty as will ever affect the validity of a bequest, but only an indefiniteness of measure, which always attaches to a residuary bequest, and which may attach to a particular legacy, or devise, without affecting its validity, but must be overcome by proof, the same as other difficulties of the kind have to be overcome. Hoffman *v.* Hankey, 3 My. & K. 376, is a case of mere conjecture, as to the intent. But in Rickards *v.* Rickards, 2 Y. & C. C. C. 419, a case of great indefiniteness in regard to the subject-matter, the uncertainty was overcome by ex-extrinsic proof.

[16] Robinson *v.* Wheelwright, 21 Beavan, 214.

[17] Salusbury *v.* Denton, 3 Kay & J. 529.

[18] Liddard *v.* Liddard, 6 Jur. N. S. 439.

12. So also, a devise of a certain number of acres out of a field, or out of a larger number of acres, and so of any other thing, is not void, for the reason that the particular subject-matter of the bequest is not definitely pointed out, but the devisee will take, either as tenant in common, or such as he shall elect, or by division by commissioners, according to the particular circumstances of the case, and the nature of the subject-matter, as well as the particular context of the will, and the attending circumstances.[19]

*13. Where a general grant is made of ten acres of ground, adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered the same as a grant.[20] And the same rule has been extended to a bequest of personalty of a given number of articles, forming part of a stock of articles of the same description, as for instance, where one gives six, out of his stock of twenty horses, in the stable.[21]

14. And where the bequest is of such articles of property, of a particular kind, as the legatee may select, this, it is said, implies, by the very use of the word select, that the whole shall not be taken. But what particular proportion, less than the whole, may fairly be claimed, seems not very well settled.[22]

15. Where the bequest is of all, except certain amount, and the exception is so indefinite that it cannot be determined, the whole will pass.[23] But the court will, in such cases, as in all others, resort to all reasonable grounds of intendment, in order to determine which subject-matter was referred to by the testator, as where the devise excepts a farm in the possession of T. H., and there were two farms, so situated, but one of them was held by the testator, as trustee, and the court presumed the testator must have intended to except the other.[24]

[19] Peck *v.* Halsey, 2 P. Wms. 387; Grace Marshall's Case, Dyer, 281 a, n.; 8 Vin. Ab. 48, pl. 11.

[*20] Hobson *v.* Blackburn, 1 My. & K. 571.

[21] Jacques *v.* Chambres, 2 Coll. 435; Duckmanton *v.* Duckmanton, 5 H. & N. 219.

[22] Kennedy *v.* Kennedy, 10 Hare, 438. But a power to a feme covert to appoint "any part of testator's residue," implies no selection, and the donee may appoint the whole. Cooke *v.* Farrand, 7 Taunt. 122.

[23] Blundell *v.* Gladstone, 14 Sim. 83.

[24] Blundell *v.* Gladstone, on appeal, where the former decree is reversed. 3 M. & Gord. 692.

16. And where the testator bequeathed all his property, in the Austrian and Russian funds, and also *that* vested in *a* Swedish mortgage security, the testator having, at the date of the * will, several sums invested on different Swedish mortgages, the Vice-Chancellor said, "The words were equivalent to 'all my property vested in Swedish mortgage security,'" and that all would pass.[25]

17. A gift to the legatee, by way of trust, or in any other form, of a sum of money, not exceeding a prescribed limit, where there is no discretion reposed in any particular person, or persons, to fix the amount, is good for the full sum.[26] It will receive the most liberal construction in favor of the legatee.[27]

18. Legacies of what shall remain, or be left, at the decease of the prior legatee, where the estate is indeterminate, and where the prior legatee has the power to exhaust the whole, is not sufficiently certain to create a valid trust. For that purpose, the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the first legatee for life.[28] Accordingly, where the bequest was of copyhold lands to one for life, and other property for her maintenance, upon full trust and confidence, that in her justice and equity, she, at her decease, would make a proper distribution of what effects might be left, to the testator's children, it was held to create a resulting trust, as to the balance of the money produced by the sale of the copyhold estate, in favor of * the heir, but that the widow was entitled to the absolute interest in the other personal estate.[29]

19. And where personal estate is given absolutely to one, with no limitation or restriction upon his title, a subsequent bequest of so much as the legatee should be possessed of at the time of his

[*25] Richards *v.* Patterson, 15 Sim. 501.

[26] Thompson *v.* Thompson, 1 Coll. 395; Cope *v.* Wilmot, 1 Coll. 396 n.; Gough *v.* Bult, 16 Sim. 45. In the last case cited the Vice-Chancellor said, "I cannot think that no sum is to be raised, merely because the expression is, 'Any sum not exceeding £2000.' 'It seems to me it would be quite ridiculous to say, that because they had not fixed the sum, therefore nothing was to be raised,' and I think that, prima facie, John had a right to have £2000 raised, unless some other sum was fixed upon."

[27] Seale *v.* Seale, 1 P. Wms. 290. This was where a sum of £300 or £400 per annum was directed to be raised, and the Lord Chancellor said, "I will construe it in the most liberal sense," and gave the £400. See also, Haggar *v.* Neatby, Kay, 379.

[28] Bland *v.* Bland, 2 Cox, 349; Wynne *v.* Hawkins, 1 Br. C. C. 179.

[*29] Wilson *v.* Major, 11 Vesey, 205.

death, without leaving issue, is void, as being repugnant to the first bequest.[30] And a mere request that the first donee will consider others as the children of the testator and the donee, unless expressed in such terms as to create a trust, is void.[31] So also, £300 in the hands of trustees, subject to the appointment of the wife, who appoints it to her husband; but so much as shall be remaining at his death, to her brothers and sisters; and it was held the property vested absolutely in the husband, the property not being sufficiently certain to create a trust in favor of the donees over.[32] And these expressions in regard to the interest in personal estate given to one, by which some indefinite interest over is attempted to be created on behalf of another, have been held not sufficient to create a valid trust: what he can transfer;[33] or what he can save out of his yearly income;[34] or what remains undisposed of, or is not disposed of by deed or will.[35]

[30] Attorney-General *v.* Hall, 1 J. & W. 458, n.; 2 Cox, 355. Annius Exrs. *v.* Vandoren's Adm., 1 McCarter, 135; Cleveland *v.* Havens, 2 Beasley, 101; Fairchild *v.* Crane, 2 Beasley, 105; Condict *v.* King, id. 375; Pruden *v.* Pruden, 14 Ohio N. S. 251.

[31] Pope *v.* Pope, 10 Sim. 1; Cuthbert *v.* Purrier, Jac. 415.

[32] Sprange *v.* Barnard, 2 Br. C. C. 585, 587. But a devise, almost in the same terms, in Upwell *v.* Halsey, 1 P. Wms. 651, was held to create a trust. Mr. Jarman, 1 vol. 336, ed. 1861, says, "it seems this case cannot now be considered law." And this case is doubted by Lord *Loughborough*, in Malim *v.* Keightly, 2 Ves. Jr. 529, 532, and by Sir *E. Sugden*, in 1 Ll. & G. 298.

[33] Flint *v.* Highs, 6 Beav. 342.

[34] 1 Jarman, 336, and note.

[35] Bourn *v.* Gibbs, 1 Russ. & My. 614; Ross *v.* Ross, 1 Jac. & W. 154; Bull *v.* Kingston, 1 Mer. 314; Grey *v.* Montagu, 2 Eden, 205; 3 Br. P. C. 315; Phillips *v.* Eastwood, 1 Ll. & G. 270; Watkins *v.* Williams, 3 M. & Gord. 622; Re Yalden, 1 DeG., M. & G., 53; Borton *v.* Borton, 16 Sim. 552.

In the last case cited, the former cases are reviewed to some extent, and the * Vice-Chancellor, *Shadwell*, comes to the very natural conclusion, that where it is obvious the testator intended to create an absolute interest over, there can be no more rational way of construing his will, than to give effect to that intention so far as the same may be practicable. It was accordingly held, that where the testator gave the residue of his personal estate to trustees, in trust for his wife for life, and after her death to his daughter, who was an infant at his death, "the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof," and by a subsequent clause, the testator gave the money over in case his daughter should die under twenty-one, or without disposing of the property by her will, it was held the daughter was entitled to the property, not absolutely, but only for life, with a power to dispose of it by will.

* 20. But there seems no question, that if the testator choose to give personal property, or real and personal together, for life, with a gift over for the benefit of another, he may do so. And it has always seemed to us, that many of the cases bearing upon this question, some of which we have referred to elsewhere, and more of them in the present chapter, were decided upon rather questionable, not to say frivolous grounds; at all events, such as were more calculated to defeat, than to promote the intention of the testator. We see no possible reason why such a bequest may not be as well maintained as any other. If the particular articles intended to be included in the bequest are indefinite, and incapable of strict identification, the legatees, in the first instance, as well as those in remainder, will have to run their own risk about finding the estate. But there seems to be no question whatever, that the gift is valid, and courts of equity will carry it into effect, as far as its subject-matter can be ascertained.[36]

* 21. A gift of what shall be left, or of what shall remain, preceded by a power of disposition, or appropriation, reserved to the trustee, naturally refers to what shall be unappointed or unappropriated by the trustee, under the power reserved to him. As where the testator bequeathed his household goods to his wife for her life, or widowhood, with power to sell the same as she should think proper, for her own benefit and the maintenance of others named, during minority, with a bequest over upon the death or marriage of his widow, or so much as should then remain, it was held the widow was entitled to a life estate in such property, or one during widowhood, with the power to apply any part of the capital for her own benefit and the proper maintenance of the persons named, dur-

[36] Andrew *v.* Andrew, 1 Coll. 690, where it is held, that consumable articles will not go over upon such a bequest, but fall into the residue, which seems to be a distinction not based on principle. Consumable articles bequeathed to one for life, and afterwards to another, will naturally create a more precarious gift over, but if actually in existence at the termination of the first estate, it seems rather fanciful to say they shall go in a direction opposed to the will, merely because they were of a perishable character, and might have been exhausted by the first estate, if it had continued long enough. That is true, in a measure, of all * specific chattels, and still there is no question they may be bequeathed in succession. Cooper *v.* Williams, Prec. in Ch. pl. 64; Constable *v.* Bull, 3 DeG. & Sm. 411; Borton *v.* Borton, 16 Sim. 552; Gibbs *v.* Tait, 8 Sim. 132. If the terms of the bequest are doubtful, the character of the property might have weight in fixing its import.

ing minority; and that upon the death or marriage of the widow, the remainder of the capital was well limited over.[37] This seems to us the just and sensible rule upon the subject.

22. And where the testator bequeathed the residue of his estate to trustees, upon trust to permit his wife to receive the annual produce during her life, and also to apply to her own use such parts of the capital as she should think proper, and after her decease, to stand possessed thereof upon trust for such persons as she should by will appoint, and in default, in trust to pay certain legacies; it was held, that the widow took a life estate only, with power of disposition of the capital during her life, and of appointment by will; and not an absolute interest.[38]

* 23. There seems to be no question, that if the will contain an absolute and unconditional disposition of real or personal estate, or of both combined; and in other portions of the same instrument there be found a bequest over of the same estate, after the death of the first donee, it will be regarded as repugnant to the first gift and void.[39] But this is very much matter of construction, and the whole will is to be considered together, and to be supposed to have all been in the mind of the testator, when he penned each separate provision. In this mode of viewing the matter, no invincible repugnancy will occur in any such provision.[40]

24. And where the bequest is of the whole or any part of the rents, issues, and profits of real and personal estate, and was made for the maintenance of an imbecile, and it appearing that such part of the rents, issues, and profits, as was requisite for the accomplishment of the object had been applied, and that the person to be benefited had deceased, it was held that the trust for his benefit was discharged, and that the surplus income of the personal property passed to the residuary legatees, and the surplus income of

[37] Surman *v.* Surman, 5 Mad. 123.

[38] Scott *v.* Josselyn, 26 Beav. 174. In favor of the life interest in the wife, were cited Reith *v.* Seymour, 4 Russ. 263; Re Sanderson's Trusts, 3 Kay & J. 497, in addition to cases already cited; and on the other side, the counsel cited Hughes *v.* Ellis, 20 Beav. 193; Holmes *v.* Godson, 2 Jur. N. S. 383; Barton *v.* Barton, 3 Kay & J. 512.

[39] Holmes *v.* Godson, 2 Jur. N. S. 383, decided by the Lords Justices in the Court of Chancery Appeal in March, 1856. And the same point is decided as to personal estate as early as Lightbourne *v.* Gill, 3 Br. P. C. 250.

[40] In Re Yalden, 1 DeG., M. & G. 53; Doe d. Stevenson *v.* Glover, 1 C. B. 448.

the real estate, there being no devise of them, passed to the heir at law.[41]

25. A devise of all the testator's property in trust for his * niece, subject to a discretionary power in the trustees, on her attaining twenty-one, or marrying, to settle the whole, or such part as they should think fit, upon her and her children, if she should have any, with remainder, in default of children, to her mother absolutely, the niece attaining twenty-one, but dying before any settlement was made under the power, without being married, it was held that the power could not then be exercised, and that her heir was entitled to the whole of the real estate.[42]

26. But it has been held, that where the gift, instead of being, as in the preceding cases, of all except what had been otherwise well disposed of, pointed to the distribution of the fund by parcels, to different persons, each of the parts depending upon the ascertainment of the others, and from the indefiniteness of the language, or some other cause, it became impracticable to ascertain the parts, upon which the extent of the other portions depended, the whole must fail. As where the testatrix gave such of her jewels, as should at her death be deposited in her jewel box at a place named, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B., and two years before her death the testatrix became lunatic, and subject to a commission, and no jewel box was, at the date of the will, or at the time of her death, deposited at the place named, nor was there any written paper designating who was to take the jewels, and it was held, that the intended gift of the jewels wholly failed.[43] And where the testator devised all his houses in South-

[41] Re Sanderson's Trusts, 3 Kay. & J. 497. The distinction between a gift of "the whole *or any part*," and a gift of the entire fund or interest (as the case may be), is here examined, and the conclusion reached, that in the former case the surplus is undefined, and in the latter case the whole fund goes to the first donee, although the purpose fails, the court regarding the purpose stated in the will as the motive of the gift rather than the object. See Cope *v.* Wilmot, 1 Coll. 396 n.; Hanson *v.* Graham, 6 Vesey, 249. But see Gude *v.* Worthington, 3 DeG. & Sm. 389.

[42] Lancashire *v.* Lancashire, 2 Phill. 657.

[43] Jerningham *v.* Herbert, 4 Russ. 388. The Master of the Rolls, Sir *John Leach*, said, "that the will contained no present gift of the jewels and other specified articles, but referred to a future act, to be done by the testatrix, in order to complete her gift, and that this future act being prevented by the subsequent lunacy, the intended gift of the jewels wholly failed."

wold to trustees, in trust for his wife for life, and after her death, in trust *to convey one of them, whichever she might choose, to his daughter M. and her heirs, and to convey all the others to his daughter C. in fee; and M. died in the testator's lifetime, whereby her election became impossible, the other daughter surviving the testator, the court held, she could take none of the houses, inasmuch as her right was only to what remained after the selection of one out of the number, in a particular mode, which had become impossible, by reason of which no title ever vested as to the remainder, which must forever remain unascertained.[44]

27. It has been held, that where the remainder of a fund is given, after providing for the erection of a chapel, or almshouses, or any other indefinite expenditure, which happens to be against the law, that the gift of the residue will fail, because of the difficulty of ascertaining that which would remain over and above what would have been requisite for the illegal object; the failure is, therefore, upon the ground of uncertainty.[45]

28. But where the deduction or charge is readily ascertainable, it will be done by reference to a master, and the gift of the remainder upheld;[46] as where the testator, after making certain dispositions of his property, provided that his executors should purchase and prepare, for the ultimate deposit of his own body, and for the removal and deposit of certain of his relatives *named, lying interred in another place, a certain piece of unconsecrated ground then belonging to another person, on which they were to build a suitable, handsome, and durable monument, the expense to be met and provided from the surplus property that should remain after payment of the above legacies and bequests. After this he gave the remainder of his property in charity. It was held, that the di-

[*] [44] Boyce *v.* Boyce, 16 Sim. 476. Sir *L. Shadwell* said: "It was only a gift of the houses that should remain, *provided*" the other daughter "should choose one of them," and as that election had failed the gift must also fail.

[45] Chapman *v.* Brown, 6 Vesey, 404; Atty.-General *v.* Hinxman, 2 J. & W. 270; Limbrey *v.* Gurr, 6 Mad. 151.

[46] Mitford *v.* Reynolds, 1 Phill. 185. It seems finally to have been held, that the expense of the monument was a mere charge upon the residue, and if it failed it, sunk into that residue, and only went to increase the amount, which is only in confirmation of the general rule upon the subject, that the residuary clause will carry not only what the testator intends to have pass by it, but also all of the estate which was not in fact well-disposed of. Sir *L. Shadwell*, V. Ch., in Mitford *v.* Reynolds, 16 Sim. 105.

rection, as to the monument, was not a charge upon the residue, but a bequest of such integral part of the residue, as would be necessary for carrying the direction into effect, and that if that direction was void, it would not invalidate the bequest of the residue, inasmuch as the sum requisite for carrying that direction into effect was capable of being ascertained.

29. And where the testator directed his trustees to expend the residue of money arising from the sale of land, in building such a monument to his memory as they should think fit, and in building an organ gallery in the parish church, Lord *Langdale* referred it to a master to ascertain in what proportion the residue should be divided between those two objects.[47]

30. And if the portion given by the testator is determined, it will not fail in consequence of the indeterminateness of other funds, which the testator desires to have made a part of the fund, to be created by the final disposition of the bequest, as where the testator bequeathed to his daughter a legacy of £10,000, with a recommendation, which was construed to have the legal effect of a direction, that the legacy, together with such sum as the husband might choose to invest on his part, should be settled for the benefit of the daughter and her children, which was held to have created a trust for the children, and that the legacy would not lapse by the death of the daughter in the life of the testator.[48]

* 31. There are some cases, where uncertainty as to the subject-matter of the bequest will render it wholly void. But if the uncertainty arise from extrinsic evidence, as we have before seen, it may be removed in the same way. But where the uncertainty appears upon the face of the will itself, it cannot be removed by resort to extrinsic evidence to show what the testator intended. This distinction is very happily illustrated by two cases, which to the unprofessional mind would seem very nearly alike. Thus a bequest to the son, or to the daughter, of A. B. would seem definite upon the face of the will. But if it should appear that A. B. had more than one son, or daughter, whichever term is used in the will, an uncertainty would arise which would be fatal to the will, unless it could be shown by extrinsic evidence, which is admissible for that purpose,

[47] Adnam *v.* Cole, 6 Beav. 353; Reynolds *v.* Kortright, 18 Beav. 417; Cramp *v.* Playfoot, 4 Kay & J. 479.

[48] Ford *v.* Fowler, 3 Beav. 146.

which of the sons or daughters of A. B. was intended to be benefited by the testator's bequest.[49]

32. But a bequest to one of the sons, or one of the daughters of A. B., presents a case of ambiguity, upon the face of the will, since it appears, by the very terms of the instrument, that the testator was conscious that A. B. had more than one son, or daughter, and that he intended to benefit one of the number in particular, and had, unintentionally, omitted to designate which particular one.[50] But in many cases, having this apparent character upon the face of the will, an escape, entirely satisfactory to the mind, out of the uncertainty, may be found, in applying the words to the subject-matter, by the aid of such extrinsic circumstances as are entirely admissible. Thus where the testator devised to several for life, and after the death of the surviving tenant for life, to a son of my nephew A., and his heirs and assigns, it was held, that this was a gift in fee to the first-born son of A. living at the time the estate vested, there having * been two sons by a prior marriage, both of whom deceased many years before the estate vested.[51]

*[49] Ante, § 41, pl. 15.

[50] 1 Jarman, ed. 1861, 341, 342; Strode *v.* Lady Falkland, 3 Ch. Rep. 183; 2 Vernon, 624, 625; T. Ray. 82.

*[51] Ashburner *v.* Wilson, 17 Sim. 204. And upon the same principle of uncertainty, a bequest to twenty of the poorest of the testator's kindred has been held void, on the ground of uncertainty as to who may be adjudged the poorest. Webb's Case, 1 Roll. Ab. 609. But at the present day the mere uncertainty of the persons, until they were ascertained, is no ground of avoiding the will. All facts, to be ascertained by external proof, as all the inhabitants within one mile of a church, until ascertained, are uncertain. But if the will point out any practicable mode of removing the uncertainty, it will not fail, that being regarded as sufficiently certain, which is capable of being reduced to certainty by extrinsic proof. Id certem est, &c.

But there are cases where a devise to the testator's brother and sister's family, he having two sisters who had families, and there being no evidence of his intention, in that respect, has been held void for uncertainty. Doe d. Hayter *v.* Joinville, 3 East, 172; Doe d. Smith *v.* Fleming, 2 C., M. & R. 638.

And where the testator made a bequest over, to "and among my nephews and nieces, John Parker and Nanny Parker," followed by a long blank, the testator having, at the time of his death, fourteen nephews and nieces in all, and it being uncertain, whether he intended to include all, the court held the next of kin entitled to the fund. Greig *v.* Martin, 5 Jur. N. S. 329.

And where the bequest was made for the benefit of such persons as should be in copartnership with the testataix at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees might

33. But where a gift is made to a class, with one exception, that person not being named or capable of being ascertained, the bequest is not thereby avoided, but takes effect in favor of the whole class.[52] And where a bequest is made to such of the * children of A., without defining the portion of the children intended to be included, it was held, that all took.[53] And a gift to the testator's aforesaid nephews and nieces, none being before named, was held to include all.[54]

34. And where the testator made a devise to his executors of £1,000, for the benefit of the widows of J. S. and T. D., "to be divided between them, share and share alike," to be invested in the Bank of England, "during the lives of the survivors or survivor of them," and appointed two executors, and as there were but two, either of the executors, or the widows, it was plain the word "survivors" could not apply to either of these classes; the Master of the Rolls, Sir John *Leach*, said: "It is impossible to put any rational construction upon the bequest, it must, therefore, be considered void for uncertainty." [55]

35. Bequests to different persons, or classes, in the alternative, as indicated by the particle *or*, will create an invincible uncertainty, unless it can be removed by construction. This may sometimes be done by holding, that, in certain events, indicated in other portions of the will, it was the testator's intention to have the different per-

deem advisable, it was objected that the bequest was void for uncertainty. But it appearing that the testatrix, at the date of her will, was in partnership with certain persons, and that she disposed of her business to some of the partners, together with a certain other person, it was held, by Lord *Langdale*, M. R., and affirmed by Lord *Cottenham*, Chancellor, that the persons to whom the testator disposed of her business were entitled to the property in such shares as the trustee should deem advisable. Stubbs *v.* Sargon, 2 Keen, 255; 3 My. & Cr. 507.

[52] Illingworth *v.* Cooke, 9 Hare, 37. The Vice-Chancellor, *Turner*, said: "I think that I must consider the testatrix as not having made up her mind whether she would except any of her grandchildren, or which of them she would except, from the benefit of her residuary bequest."

[53] Hope *v.* Potter, 3 Kay & J. 206.

[54] Campbell *v.* Bouskell, 27 Beav. 325. The grandchildren had been before named, but the Master of the Rolls thought it more consistent to reject the word "aforesaid," with reference to "nephews and nieces," than to construe those terms as used by mistake for grandchildren. See also, Mason *v.* Bateson, 26 Beav. 404; Wood *v.* Ingersole, 1 Bulst. 61; s. c. Cro. Jac. 260; Hill & Baker's Case, cited in 1 Bulst. 63; Hambledon *v.* Hambledon, Cro. Eliz. 163.

[55] Hoffman *v.* Hankey, 3 My. & K. 376.

sons or classes named, take in succession; and sometimes the word "or," has been read as equivalent to "and." But this construction is much less frequently resorted to in the later cases than formerly. We have explained this point of construction elsewhere.[56]

* 36. Uncertainty will sometimes arise by reference to extraneous facts, not definite in themselves. As where the testator devised estates to the same uses as his *other* estates, and there were several other estates devised to different uses, and it being impossible to determine which of the other limitations they were to follow, they were regarded as undisposed of, and passed to the heir at law.[57]

37. Questions have often arisen, in regard to the validity of devises and grants to several persons in succession, in consequence * of the difficulty of determining the order of the succession.[58] The

[56] Ante, § 35, pl. 16. See also, Beal *v.* Wyman, Styles, 240; Marwood *v.* Darrell, Lee's Cas. t. Hard. 84; Lowndes *v.* Stone, 4 Vesey, 649; Waite *v.* Templer, 2 Sim. 524. See also, Prestwidge *v.* Groombridge, 6 Sim. 171, where the interest of the testatrix's residuary estate was directed to be applied in defraying the education of her nephews, George and Charles, and the principal, in binding them apprentices, at fourteen, or in enabling them to commence business at twenty-one, and in the event of the elder boys, George and Charles, both or either of them, being settled before this will comes in force, "I provide that the next boy, James or Henry, have the benefit, and so on." George and Charles survived the testatrix, but died before twenty-one. The residue was claimed by James, as being in the event which had occurred, solely entitled; but the court held James and Henry entitled, it being the purpose of the testatrix to make a provision for two of the nephews, and if the provision failed, as to one of them, that James should take his place, and if it failed as to both, then James and Henry should take their places.

[57] Leslie *v.* Devonshire, 2 Br. C. C. 187. And where the testator uses technical words, without fuully comprehending their force, they may be construed according to a general popular apprehension, although not their precise legal force. As where the testator directed the residue of his real and personal estate, after the death or marriage of his widow, "to be divided according to the statute of distributions in that case made and provided," it was considered, that the real estate would go to the heir, and the personal estate, under the statute of distributions, and that the testator had not in mind any distinction, in the statutory disposition of real and personal estate, but desired both to pass, the same as if there had been no will. Thomas *v.* Thomas, 3 B. & Cr. 825. The court finally held, that only the personal estate passed under the will, according to the statute of distributions; and that the real estate did not pass, but went to the heir at law; which was the same, in effect, as if neither passed.

[58] Windsmore *v.* Hobart, Hob. 313.

obvious construction of such a devise, to several persons named in succession, is to hold them entitled in the order in which their names occur, and where the devise is to persons in a class, entitled by virtue of consanguinity to the testator, or to any other one, to allow them to take in the order of seniority.[59]

38. It is well settled, that charitable legacies will not fail, in consequence of the indefiniteness of the object, and where there are two charities of the same name, the legacy will be divided between them, if it cannot be determined which was intended.[60] But a gift to each of two objects, in the same will, where one of them does not exist, that gift will fail,[61] notwithstanding the gift might have gone to the other object, if there had been but one.

39. We have before alluded to the general subject of uncertainty in devises and bequests, growing out of what is technically called falsa demonstratio, where one or more incident in * the description of a thing is not precisely accurate, so as to afford, in that particular, a counterfeit presentment. Such a defect will not defeat the bequest, provided there remains sufficient to make a satisfactory identification of the subject-matter intended.[62] The illustrations of this rule are almost infinite, but it would be of no great benefit to enumerate them, since they are not decided upon any uniform rule of construction. It often happens, that the false portion of the de-

[59] 1 Jarman, ed. 1861, 345, 346; Ongley *v.* Peale, 2 Ld. Raym. 1312; 2 Eq. Cas. Ab. 358, pl. 8; Young *v.* Sheppard, 10 Beav. 207; and the consideration that, in such case, some condition, or restriction upon the right of enjoyment is attached to the devise, as that the several persons shall not be entitled to enter upon the subject-matter of the devise, until one month after marriage, will not affect the order of succession, or entitle a younger member of the series, who first complies with such qualification, to the right to precede an elder one, who had not complied. Ongley *v.* Peale, supra. It might be different, if the vesting of the estate had been made dependent upon the condition affecting the enjoyment. See also, Thomason *v.* Moses, 5 Beav. 77, where a devise was held void for uncertainty, in not determining what is meant by a devise to two persons in succession, and after their decease to be continued to the testator's next nearest heir, neither of the persons before named being heir of the testator. See also, Powell *v.* Davies, 1 Beav. 532; Ashburner *v.* Wilson, 17 Sim. 204.

[60] Waller *v.* Childs, Amb. 524; Bennett *v.* Hayter, 2 Beav. 81. But see Simon *v.* Barber, 5 Russ. 112. Post pl. 51.

[61] Lee *v.* Pain, 4 Hare, 254. See also, Hare *v.* Cartridge, 13 Sim. 165; Ellis *v.* Bartrum, 25 Beav. 109.

[62] Howard *v.* Conway, 1 Coll. 87; Stephens *v.* Powys, 1 De G. & J. 24. This point was determined, at a very early day. Blague *v.* Gold, Cro. Car. 447, 473 Thompson *v.* Thornton, And. 188; Chamberlaine *v.* Turner, Cro. Car. 129.

scription contradicts some other portion of the description, so that both cannot stand together, as where land is described as being situated in a particular town or county, and in the occupation of a particular person, when such person is in the occupation of an estate, lying partly in that town or county, and partly in another. It has been common, in such cases, to reject the reference to the town or county, and allow the whole estate to pass, on the ground, that the testator would be more likely to mistake the town or county, than to have described the devise as including the whole of the estate, in the occupancy of a particular person, when he intended to include but a portion of it.[63]

* 40. And the same general rule will apply to the description of the objects of a bequest. If any particular of the description is repugnant to other portions, or to existing facts, it may be rejected, where the remaining portions of the description leave no doubt in regard to the identity of the person intended. As where there is a mistake in the corporate name of a corporation, the words "town council" being used for "commonalty.[64]

[63] Hastead *v.* Searle, 1 Ld. Raym. 728; Owens *v.* Bean, Finch, 395; Brown *v.* Longley, 2 Eq. Cas. Ab. 416, pl. 14. And, as we have seen, where the devise described the land as in the *parish* of Billing, and in a street called Brook street, the testator having no lands in that parish, but having lands in Billing *street*, in another parish, they were held to pass under the devise. Brownl. 131; 8 Vin. Ab. 277, pl. 7. And, as before stated, where landed estate is devised as freehold, the testator having no freehold estate, the leasehold estate will pass under the devise. Denn d. Wilkins *v.* Kemeys, 9 East, 366; and vice versa. Day *v.* Trig, 1 P. Wms. 286; Doe d. Dunning *v.* Ld. Cranston, 7 M. & W. 1. And where houses are devised, as upon a particular street, the testator having none upon that street, but having them upon a lane opening into that street, they were held to pass. Doe d. Humphreys *v.* Roberts, 5 B. & Ald. 407. See, also, on this question of the extent of a street, Baddeley *v.* Gingell, 1 Exch. 319; ante, § 41, pl. 15, where many of these cases are stated.

[64] Attorney-General *v.* Corporation of Rye, 7 Taunt. 546; Foster *v.* Walter, Cro. Eliz. 106; 2 Leon. 165. Any misdescription in the name of a corporation may be corrected by intendment and construction, when it can fairly be made out what particular corporation was intended, provided there be not some other corporation more nearly answering the words of the bequest, than the particular one intended. If so, the corporation described will take, to the exclusion of the one intended. Tucker *v.* Seamen's Aid Society, 7 Met. 188.

The description of a corporation, together with the object intended, may be so indefinite, that the court cannot carry it into effect. Attorney-General *v.* Sibthorp, 2 Russ. & My. 107. But in general no such obstacles have been permitted to defeat the purpose of the testator. Queen's College *v.* Sutton, 12 Sim. 521; Bradshaw *v.* Thompson, 2 Y. & C. C. C. 295; Wilson *v.* Squire, 1 Y. & C. C. C. 654; Enoch *v.* Ruger, 5 Jur. N. S. 905; ante, § 41, n. 24, 25, 26.

41. As a general rule, where the name of the person is mistaken in important and essential particulars, which are not supplied by description, the bequest will fail, and it must of necessity always fail, where the name of some other person is used by mistake. And where persons are correctly named, any amount of false description will be rejected as surplusage, as where two devisees correctly named are described as the legitimate children of A., when, in fact, by the establishment of a prior marriage of A., they were declared to be illegitimate, the devise is nevertheless valid.[65]

* 42. But when it is made certain, that part of the name of the person intended has been omitted, as where John Pryce Newbott is called John Newbott, and described as the *second* son of his father, when he was in fact the third son, the certainty of the name used is sufficient to remove the uncertainty arising from the erroneous description.[66]

43. And even where the name of the devisee is mistaken in some respect, if the description of the person is such as to identify him with legal certainty, the devise or bequest will not fail on that account, as we have seen. As where a devise was made to William Pitcairne, eldest son of Charles Pitcairne, and the eldest son of Charles Pitcairne was named Andrew, the court being of opinion, nevertheless, that the person was pointed out with certainty, gave judgment accordingly.[67] There are many analogous cases to be found in the reports.[68]

[65] Standen *v.* Standen, 2 Ves. Jr. 589; Giles *v.* Giles, 1 Keen, 685; Ford *v.* Battey, 23 L. J. Ch. 225; Pratt *v.* Mathew, 22 Beav. 334. And even a great degree of certainty will not induce the courts to give a devise to one name, to another person described, but not named. Del Mare *v.* Rebello, 3 Br. Ch. Cas. 446; Holmes *v.* Custance, 12 Vesey, 279; Daubeny *v.* Coghlan, 12 Sim. 507; Hodgson *v.* Clarke, 1 Gif. 139. The last case was, however, reversed on appeal. See also, Newbott *v.* Pryce, 14 Sim. 354; Bernasconi *v.* Atkinson, 1 Hare, 345. But a mistake in the corporate name of a parish, if the person intended is clearly described, will not defeat a bequest, as where the devisees were called by their popular name, "The south Parish in S.," the legal name being First Parish in S. First Parish in Sutton *v.* 3 Pick. 232. Nor is a devise to the persons who at the time constituted a voluntary association void for uncertainty, they will take in their individual capacity. Bartlett *v.* King, 12 Mass. 537.

[66] Newbott *v.* Pryce, 14 Sim. 354.

[67] Pitcairne *v.* Brase, Finch, 403; Gynes *v.* Kemsley, 1 Freem. 293; Rivers' Case, 1 Atk. 410; ante, § 41, n. 29.

[68] Dowret *v.* Sweet, Amb. 175; Parsons *v.* Parsons, 1 Ves. Jr. 266; Smith *v.* Coney, 6 Vesey, 42; In re Feltham's Trusts, 1 Kay & J. 528.

44. And even where, in a devise to six grandchildren, the name of one was omitted, and that of another inserted twice, it has been held, that the person whose name was omitted shall take the share given to the name repeated.[69] And where the * testator gave to his *namesake, Thomas* Stockdale, the second son of his brother John Stockdale, there being no son of his brother of the name of Thomas, it was held the second son should take the bequest.[70]

45. And there have been cases where the person precisely answering the name in the will has been rejected, and the bequest given to another, imperfectly answering the name, but evidently intended. As upon a gift to Clare Hannah, the wife of A., whose wife was named Hannah, but who had an infant daughter named Clare Hannah, it was held the wife was clearly entitled, as it was impossible to suppose the testator could have called an infant daughter a wife.[71] And in one case, where the testator, after a gift to four children of my cousin A., made a gift to the remaining three children of "my uncle A.," it appearing that the cousin at the time had seven children, and the uncle three grandchildren; one of the uncle's grandchildren having deceased; it was regarded as a gift to the "*remaining*" three children of the cousin, notwithstanding the will named three children of the uncle, who might in some sense be regarded as represented by the three *remaining* grandchildren of the uncle.[72]

46. In a late case,[73] in the House of Lords, it was held, that where the testator devised an estate for life, to his "sister, Mary Frances Tyrwhitt Drake," he having no sister, but a sister-in-law * of that name; and after other devises, gave the residue to certain persons named, and among the number one was described as "my

[69] Garth *v.* Meyrick, 1 Bro. C. C. 30.

[70] Stockdale *v.* Bushby, G. Cooper, 229; 19 Vesey, 381; Doe d. Cook *v.* Danvers, 7 East, 299. In this last case the devise was to Mary Cook, wife of —— Cook, and a married woman of the name of Elizabeth Cook was allowed to take, it appearing the testator had no other relative of that name, and that she was the person intended.

[71] Adams *v.* Jones, 9 Hare, 485.

[72] Bristow *v.* Bristow, 5 Beav. 291. This case may be regarded as somewhat in conflict with the general current of the English decisions. It sounds more like an American case, where the obvious justice of the particular case had served to disguise the general principle of law upon which the case might have been decided.

[73] Drake *v.* Drake, 8 Ho. Lds. Cas. 172.

niece, Mary Frances Tyrwhitt Drake," the testator having no niece who bore that whole name, but nieces who bore one or other of the names, it was held, that this portion of the bequest was void for uncertainty.

47. And where the testator made provision in his will, for all the children of his brother Joseph, " except the oldest son, Thomas," and it was shown, by extrinsic evidence, that the oldest son of his brother Joseph, to the knowledge of the testator at the time of making his will, was possessed of a large fortune, but that it was the youngest son, who was named " Thomas," who with the other children, except the oldest, were unprovided for, it was held that the eldest son, and not Thomas, was the one intended to be excepted.[74]

48. The rule, in regard to what degree of uncertainty will render a will or a devise void, is much the same in the American courts, which we have deduced from the English cases. Thus, it was said, in Townshend *v.* Downer,[75] that a devise is never declared void, upon the mere ground that the description of the subject-matter is indefinite; — but only when, after resort to oral proof, it still remains mere matter of conjecture, what was intended by the instrument. The will must be incapable of any clear meaning. It is not enough that it is obscure, or that its apparent import is absurd.[76]

49. We have already seen[77] that where the description of the * legatee is erroneous, or the name defective, or mistaken, to any extent, it will not defeat the bequest, if the person, whether natural or corporate, is so far identified, either by the name or description, that there is no difficulty in determining the intent of the testator. The words, " members of my family," have been held sufficiently definite.[78]

* [74] Hodgson *v.* Clarke, 1 DeG., F. & J. 394.

[75] 23 Vt. 225.

[76] Wootton *v.* Redd, 12 Grattan, 196. But it is not enough to invalidate a will, for uncertainty, that all the particulars, which the testator has specified in the will, as descriptive of the subject, or object, of a devise, cannot be made to harmonize with extrinsic facts, or in any way to apply to what is indicated by the other portions of the description. Drew *v.* Drew, 8 Foster, 489; Hammond *v.* Ridgeley, 5 Har. & J. 245; Woods *v.* Woods, 2 Jones, Eq. 420.

[77] Ante, § 40.

* [78] Hill *v.* Bowman, 7 Leigh, 650; Douglas *v.* Blackford, 7 Md. 8. But see Janey *v.* Latane, 4 Leigh, 327, where the devise was held void.

50. The question of uncertainty, in regard to wills, or other instruments, has been allowed to have so small an influence in the decisions of the American courts, that there is no general course of decisions in regard to the matter. The rule, if any can fairly be said to be established, is what has already been declared and repeated, in different forms, that it must result in mere guess, or conjecture, after all the aids derivable from extrinsic evidence, what the testator did mean. And this is a dilemma, which, with our proverbial fertility in expedients, will very seldom occur. And we are glad to believe, that the English courts are coming, more and more, upon this ground: and that it is the true ground in regard to this subject.[79] The rule declared, in the case last cited, was, that a mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty.

51. In the late case of Treat's Appeal from Probate[80] where the testator left his whole estate to three persons by name, and to their successors forever, with power to continue such succession by appointment so long as they, their survivors and successors, should judge the objects of the bequest required, in trust for the promotion of education among the Indian and African children, and youth of the United States or elsewhere, as in their judgment they shall deem best. "I leave it entirely with them to decide in what manner to expend the bequest to secure this object, either by using the principal for the education of a number of youth, and thus prepare them for immediate usefulness; or to use only the annual interest, and educate a smaller number, and thus continue; or if they shall judge it best, let them use the whole amount, and establish an academy, to be a lasting benefit to that class of my fellow-men for whose benefit I have given all my property, wishing it to be used in that way, time, and place which they shall judge best, after due consideration upon the condition that the people of color shall be in, in the United States, at the time that this bequest shall be at their disposal." Held, that the bequest was not void for uncertainty, either as to the beneficiaries of the charity, or as to the mode of carrying the charity into effect.

[79] Smith *v.* Smith, 4 Paige, 271; s. c. 1 Edw. Ch. 189; Bull *v.* Bull, 8 Conn. 47.

[80] 30 Conn. R. 113. See also, Piercy *v.* Piercy, 19 Ind. 467.

*SECTION II.

DEGREE OF CERTAINTY REQUIRED TO CREATE VALID TRUSTS.

1. Where a trust is created for the benefit of objects to be selected by the trustee, it is void for uncertainty.
2. But where the general purpose is pointed out, the court may carry it into effect.
3. To create a binding trust the words must be imperative, and the object, and subject, both certain.
4. Where either the object, or subject, of a trust cannot be ascertained, the trust fails.
5. And where it appears, that the object was defined in some way not known, it will fail.
6. Mere recommendation creates trust, if the subject and object is clearly defined.
7. Courts of equity will aid trustees in carrying their duties into effect, but will not absolutely control them.
   a. Where a power is connected with a trust, the court will enforce its execution.
   b. Courts of equity will aid the trustees, by removing obstructions.
8. Decisions in regard to trusts constantly varying, and early decisions not always reliable.
9. Precatory words sufficient, where the intent is clear, to create a beneficial interest.

n. 14. Digest of numerous cases upon this point.

10. The real question in such cases always is, whether testator intended to control the trustee.
11. But there are many exceptional cases, where words of devise have been held obligatory.
12. The proper course seems to be, to follow the natural import of the words.
13. Money given absolutely to the legatee, but for a special purpose.
14. If the trustee has an absolute discretion, it will control the title of cestuis que trust.
15. But where others besides the donee are interested, courts will interfere.
    a. If the donee is a mere trustee, without interest, he is compellable to act.
    b. Where the donee has a joint interest with others, he may also be compelled to act.
    c. Cases where the gift is absolute, and the wish of the testator expresses merely his motive.

n. 45. Cases where there was only a moral, or no obligation before.

n. 50. Cases where the gift is to those owing a legal obligation to perform the duty expressed.

    * d. The whole subject of trusts created by precatory words rests on no sound basis.
    e. Recommendations in favor of tenants, agents, and stewards, enforced in courts of equity.
    f. But this rule is shaken, if not overruled, in Lawless *v.* Shaw.
    g. Some of the American cases seem] to favor the same view, as Lawless *v.* Shaw.

h. The late English cases manifest the same inclination.
i. Trustees having a discretion, under control of courts of equity, if they abuse it.
k. Decision of United States Supreme Court upon the question.
l. Mr. Justice McLean's opinion upon the point.
m. Early case in Connecticut.
n. Subject further considered and rule more definitely established.
o. and n. 67. Cases in Vermont and other states.

§ 43. 1. WHERE a person indorsed a promissory note for £2,000, and sent it by letter to another, giving it to her for her sole use and benefit, for the express purpose of enabling her to present to either branch of the donor's family any portion of the principal or interest thereon, as she might consider most prudent, and in the event of the death of the donee, empowered her to dispose of the fund by will or deed to those, or either branch of the family she might consider most deserving thereof, it was held, that this letter created a trust, the objects of which were too undefined to enable the court to execute it, and that the £2,000 formed part of the testatrix's general personal estate.[1]

2. And a gift to trustees of a fund to be expended in private charity, is too indefinite to enable the court to carry it into effect. A trust to be carried into execution in equity must be of such a nature that it can be under the control of the court. And if the trust be ineffectually created out of personalty, the fund will go to the next of kin.[2] It is here said, if any particular object, as the erection of a school, or even a general * object, more indefinite than that, be pointed out, so that the court can see what the purpose is, the court will execute the trust, although the object pointed out may fail. But the cases upon which the court has interfered on the ground of trust, are here distinguished from those in which a direct charity has been pointed out. And where a trust was created for general charity by the words, "If there is money left unemployed, I desire it may be given in charity," the bequest will be upheld and carried into effect.[3]

3. Lord *Langdale* has defined[4] the degree of certainty required to create a valid trust, thus: "Any words by which it is expressed, or from which it may be implied, that the first taker may apply any

*[1] Stubbs *v.* Sargon, 2 Keen, 255. This case was affirmed, 3 My. & Cr. 507.
[2] Ommanney *v.* Butcher, 1 Turner & Russ. 260.
*[3] Legge *v.* Asgill, 1 T. & Russ. 265, in note.
[4] Knight *v.* Knight, 3 Beav. 148, 174.

part of the subject to his own use, are held to prevent the subject of the gift from being considered certain. And a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object, or class of objects, is to take, will prevent the objects from being certain within the meaning of the rule. And in such cases we are told,[5] the question "never turns upon the grammatical construction of the words. . . . I must consider the subject-matter, the situation of the parties, and what is the probable intention." And in another case[6] it is said, that to create a trust by means of an obligation imposed upon the conscience of the devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

4. A writer of great learning and accuracy, in discussing this point, says:[7] "Courts of equity carry trusts into effect only * when they are of a certain and definite character. If, therefore, a trust be created in a party, but the terms by which it was created are so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general fund of the author of the trust."

5. And it has been held, that where a legacy is given to an individual, for a purpose expressed, or to be expressed, in some other paper referred to, and for some unexplained cause that purpose is not known to the court, it creates such an uncertainty, that a court of equity cannot, by construction merely, declare the intention of the testator;[8] that this case, where, from the very terms of the will

[5] Meggison *v.* Moore, 2 Ves. Jr. 630, 632, 633.

[6] Wright *v.* Atkins, 1 Turn. & Russ. 143.

[7] 2 Story, Eq. Jur. § 979 a; Wheeler *v.* Smith, 9 How. U.S. 55, 79; Morrice *v.* Bishop of Durham, 10 Vesey, 521. In this last case, Lord *Eldon* said: "If a testator expressly says he gives upon trust, and says no more, it has long been established that the next of kin will take. Then if he proceeds to express the trust, and does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said he gave upon trust, and stopped there, as in The Bishop of Cloyne *v.* Young, 2 Vesey, 91. In Pierson *v.* Garnett, 2 Br. C. C. 38, 226, and the other cases of that sort, the question was, whether the testator had said he gave upon trust, and the decision was, that he had, as the object and subject were sufficiently described." See also, Ford *v.* Fowler, 3 Beavan, 146; Harland *v.* Trigg, 1 Br. C. C. 142; Robinson *v.* Waddelow, 8 Sim. 134.

[8] Gloucester *v.* Wood, 3 Hare, 131. This case was affirmed in the House of

there is an obvious cause for the uncertainty, namely, the absence of the paper wherein the testator * had made the purposed declaration of intention, makes it essentially different from the ordinary case, where the court have before them all which the author of the trust intended to say, in order to create it.

6. A great deal of discussion has arisen in the courts of equity, in regard to the force of words of recommendation, in wills, in regard to the use to which the testators might desire the persons, to whom they had given legacies, to put the same; and how far merely precatory words, or words of wish, or desire, would have the effect to create an obligatory trust. But it seems to have been adopted, as a rule of the courts of equity, at one time, certainly, that no particular form of expression is requisite, in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish, or expectation, will impose a binding duty upon the devisee, by way of trust, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object of the trust.[9]

7. The courts of equity, although not possessing the power, either to control, or to exercise, a discretion vested absolutely in trustees, will, nevertheless, define certain limits, beyond which * the discre-

Lords, 1 Ho. Lds. Cas. 272. See also, Briggs *v.* Penny, 3 De Gex & Sm. 525; 3 McN. & G. 546. Where the gift implies no object at all, but merely that the donee shall dispose of it, the gift is considered absolute in him. Gibbs *v.* Rumsey, 2 V. & B. 294. And a bequest to three persons, as tenants in common, subject to any disposition the testator might thereafter make, by deed or writing duly executed, and none being made, it was held, the donees took an absolute interest. Fenton *v.* Hawkins, 9 W. Reporter, 300. But if the gift be clearly in trust, and the trust fail for uncertainty, the property, being personal, goes to the next of kin. Fowler *v.* Garlike, 1 R. & My. 232.

[9] Reeves *v.* Baker, 18 Beav. 373; Macnab *v.* Whitbread, 17 Beav. 299; 1 Jarman, ed. 1861, 336. The cases upon this point are very numerous, and have been decided mainly upon the particular facts and circumstances of each case. The question arose in Gilbert *v.* Chapin, 19 Conn. 342, and was discussed very much at length, the court being divided. It was there held, by the majority of the judges, that a devise to the testator's widow, to her and her heirs forever, recommending to her to give the same to my children, created a fee-simple in the first grantee. Mr. Chief Justice *Church*, who gave the opinion of the court, recognized the rule that precatory words are sufficient, according to the decisions of the English courts, to create a trust, but claims that the rule has led the English courts to disregard the real intent of the testators, in the majority of the cases, and that the American courts have not established any settled rule upon the point, and that they are, therefore, at liberty to follow what they may esteem the actual intent.

tion of the trustees cannot extend, and where there is an entire failure to perform the duty, on the part of the trustee, will adopt such general rules of construction, as will enable them to attain the nearest approximation to the purpose of the intended trust. As where certain trusts were declared, for the benefit of adults and infants, with the power to revoke these uses, and declare others, with the consent of the trustees and the cestuis que trust, it was held, that a revocation of the uses, for the purpose of creating a mortgage of the estate, was not within the discretion thus given, and that a discretion, vested in trustees of a settlement, must be exercised in such a way as to preserve, not to defeat, the objects of the settlement.[10] But where the trustees have a legitimate discretion, the most the courts have seemed inclined to do in the matter, is:

a. To ascertain whether the trustees have abandoned the trust, and if they have done so, to make an equal distribution among the objects, coming within the range of the discretion of the trustees.[11] There is, however, a distinction between a mere power and a trust. The failure to execute the former, for any cause (not the defective execution, but the entire failure to attempt the execution), wholly defeats all beneficial interest under it, and the court cannot supply the defect. But where the power is connected with a duty, or obligation, to execute it for the benefit of others, the donee of the power becomes a trustee, for the execution of it, and has no discretion, whether he will exercise it or not, and the courts of equity will not permit the failure of the trustee to exercise such power or discretion, through negligence, accident, or other circumstances, to * disappoint the interest of those for whose benefit the exercise of the trust was committed to the trustee:[12]

* [10] Eland *v.* Baker, 7 Jur. N. S. 956 (1861). See also, Howard *v.* Ducane, 1 Turn. & Russ. 81; In re Wilkes Charity, 3 Mac. & Gor. 440.

[11] Wain *v.* Earl of Egmont, 3 My. & K. 445. The Master of the Rolls here said: "The petitioners must first submit their claims to the investigation and allowance of the trustees, and if the trustees refuse to enter into the investigation, they will then be justified in an application to the court."

* [12] Brown *v.* Higgs, 8 Vesey, 561; S. C. 4 Vesey, 708, and note. It has been said, that where the donor expresses a general intention in favor of a whole class, and a particular intention in favor of such of the class as the trustee may select, and the selection fails to be made, thus defeating the particular intent, the court will carry into effect the general intent, and distribute the fund equally among the entire class. Burrough *v.* Philcox, 5 My. & Cr. 73, 92. See also, Brown *v.* Higgs,

b. To aid the trustees in the execution of their power, and to remove any obstructions thrown in their way, by means of the uncertainty of the discretion intrusted to them, or in any other mode. And it has been very recently decided, that an application to the courts for aid in carrying out the trust by the trustees, is no ground of inference that the trustees disclaim, or intend to relinquish their discretion.[13]

8. Questions have very often arisen in regard to what was claimed, on the one hand, as the creation of a trust, and on the other, as an absolute gift to the donee, and the interference of the courts has been demanded in order to determine rights dependent upon these adversary claims.* It will scarcely be required that we refer in detail to the cases upon this point. They will be found in many of the elementary treatises, but will scarcely repay the labor of careful revision, since the doctrine of the early cases is constantly disregarded, and no one feels any confidence in relying upon any decision in regard to * trusts, unless it has been very recently made, or else many times recognized, in the later decisions of the courts.[14]

5 Vesey, 495; Harding *v.* Glyn, 1 Atk. 469; Duke of Marlborough *v.* Lord Godolphin, 2 Vesey, 61; Witts *v.* Boddington, 3 Br. C. C. 95. But in the opinion of Lord *Alvanley*, M. R., in Brown *v.* Higgs, 5 Vesey, 499, et seq., the cases are carefully reviewed, and many of them corrected by reference to the Registrar's Book, and the proper distinction between a mere power, and a power connected with a trust, carefully pointed out. This question is examined, and the leading authorities quoted in an able opinion of Sir *W. Page Wood*, Vice-Chancellor, in Joel *v.* Mills, 7 Jur. N. S. 389 (1861). And the same principle is maintained in Little *v.* Neil, 10 W. Reporter, 592, by V. C. *Kindersley* (1862).

[13] Joel *v.* Mills, 7 Jur. N. S. 389.

* [14] In Massey *v.* Sherman, Amb. 520; S. C. nom. Macey *v.* Shurmer, 1 Atk. 389, the testator devised copyholds to his wife, not doubting she would dispose of the same to and amongst his children as she should please, and it was held to create a trust for the children, as the wife should appoint. And the bequest, with a "dying request," that if the devisee should die without issue living at his death, he shall dispose of the same amongst the descendants of a particular person, "in such manner and proportion as he shall think proper," was held to create a valid trust for the persons named. Pierson *v.* Garnett, 2 Br. C. C. 38, 226. See also Wynne *v.* Hawkins, 1 Br. C. C. 179; Parsons *v.* Baker, 18 Vesey, 476; Malone *v.* O'Connor, 2 Ll. & Gould, 465; Re O'Bierne, 1 J. & La T. 352.

And a recommendation was held to create a valid trust. Malim *v.* Keighley, 2 Ves. Jr. 333, 529. See also, Paul *v.* Compton, 8 Vesey, 380; Knott *v.* Cottee, 2 Phill. 192; Cholmondelley *v.* Cholmondelley, 14 Sim. 590. But sometimes the word "recommend" has been held not to create a trust. Meggison *v.* Moore, 2 Ves. Jr. 630. And where the testator left one-third part of his estate "entirely at the disposal of my dear and loving wife, among such of her relations as she

* 9. This subject is very carefully examined, and the later cases somewhat discussed, in a recent case,[15] by a judge of great learning and experience, and some points rendered clear, which before seemed to be involved in a good deal of uncertainty. It would seem, from this case, that there is no essential difference between precatory words and any other form of expression, in regard to the necessity of having the subject and object of the devise clearly pointed out, in order to give such a form of bequest the force of creating a trust. All that is meant by the cases upon this point, is, that the subject and object intended being clearly pointed out, will aid the court in construing it a trust. But even where mere words of request or desire are used, if it is clear that a binding duty was intended to be imposed upon the trustee, it will be none the less a trust impressed upon the fund, because the subject or object of the trust is not clearly defined.[15]

may think proper," and the wife died without making any such disposition, it was held, that her next of kin were entitled to the fund. Birch *v* Wade, 3 V. & B. 198. So an entreaty to leave the share of testator's estate, left to the person addressed, to the testator's children and grandchildren, was held to have created a contingent trust subject to the power of selection. Prevost *v.* Clarke, 2 Mad. 458. See also, Pilkington *v.* Boughey, 12 Sim. 114. And the request that testatator's wife, to whom he left an estate, together with another, to whom he left nothing, should superintend and take care of the education of his nephew, so as to fit him for any reputable employment, was held to create a trust in favor of the nephew, by which he was entitled to be educated and maintained out of the income of the property left to the widow, the remainder after her death being left to the nephew. Foley *v.* Parry, 2 My. & K. 138; S. C. 5 Sim. 138. And the expression, "I desire to give," creates a trust. Mason *v.* Limbury, cited in Vernon *v.* Vernon, Amb. 4. So also, "I hereby request." Nowlan *v.* Nelligan, 1 Br. C. C. 489. So of the word "confiding." Griffiths *v.* Evan, 5 Beavan, 241. See Brook *v.* Brook, 3 Sm. & Gif. 280; Alexander *v.* Alexander, 2 Jur. N. S. 898. So also, of the terms, "advise him to settle." 5 L. J. N. S. Ch. 98. "A last wish to daughters to give my grand-daughter £1,000 also." Hinxman *v.* Poynder, 5 Sim. 546. "Require and entreat." Taylor *v.* George, 2 V. & B. 378. "Trusting that he will preserve the same, &c., so that it may go and be equally divided." Baker *v.* Mosley, 12 Jur. 740. "To apply the same." Salusbury *v.* Denton, 3 Kay & J. 529. And a direction to trustees to convey, so that the wish and desire of the testator may be observed, "which is hereby declared, that the other children may be allowed to participate," will create a valid trust. Liddard *v.* Liddard, 6 Jur. N. S. 439. There are many other cases where similar forms of expression are used.

[15] Bernard *v.* Minshull, Johnson, 287. See also, Bonser *v.* Kinnear, 2 Gif. 195. But if the gift be absolute in the first instance, subsequent precatory words will not cut it down to a mere trust. Ib.

10. The rule in regard to the effect of precatory words, in creating a binding trust, as stated by one learned judge, and adopted by another,[16] is that "the real question in all these cases always is, whether the wish, or desire, or recommendation, that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." And Sir *W. P. Wood*, * Vice-Chancellor, in Bernard *v.* Minshull,[16] argues, that the language of Lord *Truro*,[17] in saying, that in all such cases, in order to constitute a trust, when the words used are merely precatory, a certain subject and a certain object are indispensable, was not intended to imply, that the objects intended must appear with certainty to the court, but only that the testator had such objects in contemplation. And the learned judge concludes, that although the certainty of the subject and of the object may clearly indicate the existence of a trust, and so exclude the beneficial interest of the donee, and create a trust, the converse of this proposition is by no means true, and if it shall clearly appear that a trust was intended, however indefinite may be the subject, or the object, it must nevertheless be so treated, notwithstanding the words used in its creation are merely precatory. And it was also held, in this same case, that where a trust was created, so as to exclude the donee, if the object of the trust were too indefinite to be carried into effect by the court, the fund must be carried into the residuum of the estate, notwithstanding the person entitled to the residuum is the same from whom this fund had been expressly excluded, in the former portion of the will. And if a discretion is reposed in trustees, to apply funds committed to them, to either of the objects, one of which is legal and the other not, the bequest is valid, the law rather presuming that the discretion will be so exercised, that the legal object shall have the preference.[18] And a bequest to the

[16] Lord *Cranworth*, V. C., in Williams *v.* Williams, 1 Sim. N. S. 358, and by Sir *W. Page* V. C., in Bernard *v.* Minshull, Johns. 276. S. P. Van Duyne *v.* Van Duyne, 1 McCarter, 397. The court here say, "In the absence of any adjudicated case, or settled rule of construction" in this state, the court "feel at liberty to adopt such rule of construction as seems best calculated to effectuate the intention of the testator."

[17] Briggs *v.* Penny, 3 McN, & Gor. 546.

[18] Faversham *v.* Ryder, 5 DeG., M. & G. 350.

wife of the testator, declaring, that although he had given all to his wife, it was, nevertheless, his desire, if his children conducted themselves to her approbation, she should leave such property equally among them all, was held to create a trust in favor of the remaining children.[19] But in a very recent case, where the testator left all the residue of his property, real and personal, to * his wife, with power to dispose of the same, among all or any of his children, in her discretion, it was held to be an absolute gift to the wife.[20] And it seems pretty generally settled, by a long succession of well-considered cases, that where the words of the will clearly indicate a disposition in the testator, to give the entire interest, use, and benefit of the estate, absolutely, to the donee, it will not be restricted, or cut down to any less estate, by any words of expectation or desire, however strongly expressed, that the donee will dispose of the estate, or what remains unexpended at his decease, in any particular manner indicated in the will.[21] And a recommendation to the donee, to dispose of the estate in a particular manner, will not affect with a trust for that purpose a donation, to be disposed of by the will of the donee, in such way as she shall think proper.[22] And in the case of Williams *v.* Williams,[23] the testator bequeated property to his wife, absolutely for her own use and benefit, and subsequently wrote her, as follows: "I hope my will is so worded, that every thing that is not in strict settlement, you will find at your command. It is my wish, that you should enjoy every thing in my power to give, using your judgment where to dispose of it amongst your children, when you can no longer enjoy it yourself, but I should be unhappy if I thought that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." It was held, by * Lord *Cranworth*, V. C., that the words of the letter, which, as the law

[19] Bonser *v.* Kinnear, 6 Jur. N. S. 882.

[20] Howarth *v.* Dewell, 6 Jur. N. S. 1360. The Master of the Rolls, Sir *J. Romilly*, said: "Those words are nothing more than a suggestion." "They do not amount to a precatory trust." . . . . "All the class of cases to which they belong contain estates for life, while here the gift is absolute, with superadded words." See also, upon this general subject, Gully *v.* Cregoe, 24 Beav. 185.

[21] Meredith *v.* Heneage, 1 Sim. 542; Wood *v.* Cox, 1 Keen, 317; S. C. reversed by Lord *Cottenham*, 2 My. & Cr. 684; Winch *v.* Brutton 14 Sim. 379; Bardswell *v.* Bardswell, 9 Sim. 319; White *v.* Biggs, 15 Sim. 33; Fox *v.* Fox, 27 Beav. 301.

[22] Johnston *v.* Rowlands, 2 DeG. & Sm. 356.

[23] 1 Sim. N. S. 358. See also, Green *v.* Marsden, 1 Drew. 646.

then was, operated as a codicil to the will, were not sufficient to reduce the absolute gift to the wife, to a trust, but this opinion of the learned judge is based, to some extent, upon the difficulty of determining who were to be the cestuis que trust, if any trust was created; but more upon the fact, that the testator intended what was said in the letter, as a mere expression of his preference or desire, at the same time leaving the entire disposition of the estate, in the absolute disposal of the legatee. The general rule, in this class of cases, is here well stated by this able and experienced judge, and which we have already quoted.[24] And the same rule of construction is adopted by Vice-Chancellor *Kindersley*.[25]

11. But there are, it must be confessed, numerous cases in the books, where very indefinite expressions of mere wish or desire have been construed to create a trust, in behalf of persons indicated. Where the gift was made to the wife of the testator, in as absolute terms as it is possible to conceive, with the addition of an expression of the testator's "full confidence that she would, in every respect, appropriate and apply the same unto, and for the benefit of, all his children, it was held, that the widow took a life-estate, with a power of appointment among the children.[26] And there are many other cases, where the forms of expression were not very dissimilar, that it was held no trust was created. As where the testator gave all his estate to his wife, trusting that she would use it for the spiritual and temporal benefit of herself and children, remembering always * the Church and the poor, it was held, the wife took absolutely.[27]

12. It seems clear, that where the expression of request or desire in the will is ever so strong, that it will not be construed to create a trust for others, where the will contains an expression that the devisee is nevertheless to be free to act in his own discre-

* [24] Ante, pl. 10.

[25] Webb *v.* Wools, 2 Sim. N. S. 267. The learned judge here said: "If I put on the latter [portion of the sentence] a construction which will have the effect of creating a trust for the benefit of the children, I shall make the two branches of the sentence contradictory." The cases bearing upon the question are here cited, and very extensively examined by the learned judge.

[26] Ware *v.* Mallard, 16 Jur. 492.

* [27] Curtis *v.* Rippon, 5 Mad. 434. In Abraham *v.* Alman, 1 Russ. 509, words strongly indicating an intention to provide for two of testator's grandchildren, were held not to have that effect. See also, Sale *v.* Moore, 1 Sim. 534; Hoy *v.* Mastton, 6 Sim. 568; Lechmere *v.* Lavie, 2 My. & K. 197; Wynne *v.* Hawkins, 1 Br. C. C. 179; Horwood *v.* West, 1 Sim. & Stu. 387.

tion.[28] And it has always seemed to us, that the proper construction in all such cases was to follow the natural import of the words used. And this seems the inclination of the later cases.[29]

13. It is well settled, that where the bequest is for any particular purpose, or object, defined in the will, if that has reference exclusively to the benefit of the donee, and the application of the money to that purpose is, by the terms of the will, left to the mere will and good faith of such donee, courts of equity will not attempt to compel the application, according to the prescribed purpose. Thus, where money is given to purchase for the legatee a ring,[30] or an annuity,[31] or a house,[32] to set one * up in business,[33] or for his maintenance and education,[34] or to bind him an apprentice, it was held to be an absolute gift, and not to create trusts for the particular use.[35] In an important case, where money was given for the board and education of an infant, until he shall be fit to be put out an apprentice, then a further sum, as an apprentice fee for him, and the legatee having become nineteen years of age, and not having been put out, it was held, that he was entitled to the legacy.[36] And where the testator gave estates to trustees in trust to pay £300,

[28] Young *v.* Martin, 2 Y. & C. C. C. 582. V. Ch. *Knight Bruce* here said: "I never knew such a question to be made, where the testator has stated, as he has here, that they were not to be considered as words of injunction."

[29] 1 Jarman, 363; Bayne *v.* Crowther, 20 Beav. 400. But where the income only of a fund is directed to be applied to the maintenance and support of the donee, at such times and in such proportions, and in such manner as the trustees shall, in their discretion, think most expedient, and for no other purpose whatever, it was held, that the donee's assignees in bankruptcy were not entitled to any portion of the provisions thus made. Twopeny *v.* Peyton, 10 Sim. 487.

[30] Apreece *v.* Apreece, 1 V. & B. 364.

[31] Dawson *v.* Hearn, 1 Russ. & My. 606; Ford *v.* Batley, 17 Beav. 303; Re * Browne's Will, 27 Beav. 324. And it makes no difference that the money is directed to be invested in purchasing an annuity, if the annuitant die, immediately after the testator, her administrator shall have the money, producing the annuity, and the rents and profits which have already accrued. Yates *v.* Compton, 2 P. Wms. 308.

[32] Knox *v.* Hotham, 15 Sim. 82.

[33] Gough *v.* Bult, 16 Sim. 45.

[34] Webb *v.* Kelley, 9 Sim. 472; Younghusband *v.* Gisborne, 1 Coll. 400.

[35] Barlow *v.* Grant, 1 Vernon, 255; Nevill *v.* Nevill, 2 Vernon, 431.

[36] Barton *v.* Cooke, 5 Vesey, 461. It is here said, if a legacy is given for the benefit of an infant one way, and it cannot be so applied, it may be applied for his benefit in another way, as if it was to put him in orders, and he has become a lunatic.

annually, for the support of his son's children, during the life of their father; the son had three children, who became of age, and then one of them died, and it was held, that the personal representatives of the deceased child were entitled to one-third of the provision, during the father's life.[37] Vice-Chancellor *Shadwell*, in Noel *v.* Jones,[37] states the general rule in this class of cases, thus, "that where a legacy is given for the benefit of an infant, in a particular mode, it must be taken to be a general legacy," and this, we apprehend, is the rule by which this class of cases is determined.

14. But where the trustees have a discretion in regard to the amount which they shall apply for the benefit of the cestuis que trust, and apply less than the whole fund, in the exercise of * that discretion, nothing more can be claimed, either by the donee or his personal representatives.[38] And where the gift is absolute, and the trustees fail to apply the whole according to the directions of the will, the portion reserved will go to the personal representatives.[39]

15. Where the motive or purpose of the gift is the benefit of others, as well as the donee, courts will, in some cases, assume the enforcement of the trusts.

a. Where the bequest is such as to create no interest in the first donee, but that of a mere trustee for the benefit of others, the trustee will, in such case, be required by the courts to perform the trust. As where the testator gave the residue of his property to his sister, to be disposed of by her, among her children, as she might think proper, it was held to create no interest in the sister,[40]

[37] Lewis *v.* Lewis, 16 Sim. 266; Noel *v.* Jones, id. 309; 1 T. & Russ. 207; 1 My. & K. 420.

[38] In re Sanderson's Trusts, 3 Kay & J. 497.

[39] Beevor *v.* Partridge, 11 Sim. 229. In this case the court held, that there was an absolute gift of the entire income of the fund to the three children of the testator, and the survivor of them, with a power to the trustees to modify the distribution of the same, and that whether they exercised the power or not, or however defectively they might exercise it, the gift would remain. If the whole income is needed for maintenance, the result is the same as if there was an absolute trust. Rudland *v.* Crozier, 2 De Gex & J. 143. But where there is no absolute gift, and the discretion, upon which it depended, is not exercised during the life of the donee, it wholly fails. Cowper *v.* Mantell, 22 Beav. 213.

[40] Blakeney *v.* Blakeney, 6 Sim. 52. But see Taylor *v.* Bacon, 8 Sim. 100. Where the interest is secured to one for his own benefit, and that of his children, it has been construed as a gift, to enable him to maintain his children. Robinson *v.* Tickell, 8 Vesey, 142; Cooper *v.* Thornton, 3 Bro. C. C. 96, 186; Brown *v.* Casamajor, 4 Vesey, 498.

but to be a complete trust for the children. But here care is to be taken to distinguish between that class of cases, where the gift is really to the donee, to enable him the better to discharge his duty to others, as to parents, to enable them to support their children in a comfortable manner; and that other class, where the donee is a mere * trustee, for the benefit of others. The cases, which have been held to belong to these different classes, seem to us to have been distinguished from each other by very narrow boundaries.[41] In many of the cases already cited,[41] the donee and the others named, for whose benefit the gift is expressed to have been made, have been held to have a joint interest.

b. There is also another class of cases, where the donee is held to have incurred, by the terms of the bequest, a duty towards others, for whose benefit the bequest was in fact made, and in regard to the exercise of such duty, to be liable to the control of a court of equity, to the extent at least of requiring him to exercise an honest judgment in the matter.[42] But the mode and the extent of interference depends upon the particular phraseology, in each case.[43] Where the residue of an estate is directed to be paid to the testator's niece, to be applied by her, at her discretion, for the education of her son, she not to be liable to account to him, or to any other person, for the disposal or application of the same, it was held, that she was entitled to the whole residue, which was considerable, subject to the application of so much, as the court might think fit, to the education of the son during his minority.[44] And, in general, where the gift is to one, for the accomplishment of a particular purpose as to others, the donee will hold the fund, beyond any control of the courts, so long as the duty specified shall be faithfully performed.[45]

[41] Jubber *v.* Jubber, 9 Sim. 503; Chambers *v.* Atkins, 1 Sim. & Stu. 382; Wetherell *v.* Wilson, 1 Keen, 80; Wilson *v.* Maddison, 2 Y. & C. C. C. 372; Re Harris, 7 Exch. 344.

[42] 1 Jarman, ed. 1861, 370.

[43] Castle *v.* Castle, 1 DeG. & J. 352.

[44] Humbly *v.* Gilbert, Jacob, 354.

[45] Gilbert *v.* Bennett, 10 Sim. 371. Some questions have been made in the reported cases, in regard to the period at which an alimentary stipend for children shall cease. In Badham *v.* Mee, 1 R. & My. 631, it was decided, that a bequest for "maintenance, education, and *bringing up*," had reference prima facie * to the period of minority. But in Soames *v.* Martin, 10 Sim. 287, a bequest for "maintenance and education" was held not limited to that period. And a similar view is taken in Ellis *v.* Maxwell, 3 Beav. 587.

But even where the testator gave his residuary estate * to his wife, to the intent that she might dispose of the same for the benefit of herself and their children, in such manner as she might deem most advantageous, it was held the wife did not take an absolute interest.[46]

c. There is a considerably numerous class of cases, where the bequest has been held to vest an absolute title in the donee, and the expression, by the testator, of the purpose and object of the gift, has been held merely descriptive of the motive of the testator, in making the provision. Such are gifts to a father, the better to enable him to provide for his younger children,[47] toward the maintenance, education, and bringing up of the donee's children;[48] to enable the donee to assist such of the children of his deceased brother, as he might find deserving of encouragement;[49] to enable the testator's wife to support * herself and her children, according to her discretion.[50] It has been held, that a distinction is to be made between a gift to one, for the maintenance and education of another, where the donee was under no legal obligation to maintain that person, and a gift to one having such obligation upon him, the better to enable him to do so.[51]

[46] Raikes *v.* Ward, 1 Hare, 445. There are many other cases where this question is discussed, and similar principles to those already stated have been adopted. Hadow *v.* Hadow, 9 Sim. 438; Leach *v.* Leach, 13 Sim. 304; Browne *v.* Paull, 1 Sim. N. S. 92; Bowden *v.* Laing, 14 Sim. 113; Longmore *v.* Elcum, 2 Y. & C. C. C. 363; Crockett *v.* Crockett, 2 Phill. 553, reversing the decision in same case, 5 Hare, 326. This last case was that of a bequest by the testator "to be at the disposal of his wife for herself and children," and Vice-Chancellor *Wigram* held, that it created a joint-tenancy in the wife and all the children. But the Chancellor held, there was no joint-tenancy, but that the widow, although not entitled to the property absolutely, had a personal interest in it, and as between herself and her children, was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favor of the children, subject to a life-interest in herself. See also, Conolly *v.* Farrell, 8 Beav. 347; Woods *v.* Woods, 1 My. & Cr. 401; Costabadie *v.* Costabadie, 6 Hare, 410; Cowman *v.* Harrison, 10 Hare, 234; Smith *v.* Smith, 2 Jur. N. S. 967.

[47] Brown *v.* Casamajor, 4 Vesey, 498.

[48] Mammond *v.* Neame, 1 Swanst. 35.

[49] Benson *v.* Whittam, 5 Sim. 22.

[50] Thorp *v.* Owen, 2 Hare, 607. Vice-Chancellor *Wigram* here says, that a bequest to one to increase his funds, so that he might be the better able to do something named as the motive of the gift, is an absolute gift. Thus a legacy to enable one the better to pay his debts, creates no trust which the creditors could enforce, and so, prima facie, of a gift, the better to enable one to maintain and educate his children.

[51] Thorp *v.* Owen, supra; Byne *v.* Blackburn, 26 Beav. 41; Biddles *v.* Biddles,

d. It is well said by Mr. Jarman,[52] that the courts, at some periods, have gone almost to an absurd length, in construing the slightest intimation of a desire to have the avails, or any part of the avails, of a legacy, or devise, appropriated in a particular manner, by the devisee or legatee, into an obligatory trust for that purpose; and this learned and prudent writer suggests the propriety of always accompanying such expressions of wish or desire on the part of testators, with the explicit declaration, that nothing obligatory is intended. This, we think, is what is always intended by testators, in the use of these hortatory expressions in their wills, toward the recipients of their bounty. There is scarcely one man in a thousand, who would, in such cases, use any such indefinite and optional forms of expression, toward those whom he expected to assume a binding duty and obligation to others in regard to the corpus, or the income, of the bequest. He uses such precatory words, because he desires to leave it to the *discretion* of the donee; and if he intended to control that discretion, he would adopt very * different language. So that, probably, in nine cases out of ten, where the courts have raised a trust out of such mere words of wish and exhortation, it has been done contrary to the expectation of the testator, and more out of regard to the moral, than the legal duty, of the donee. And we are happy to perceive, in the later English cases, a disposition to return to this obvious and natural construction of the words of the will, in these respects, and to leave the results of misplaced confidence, where all such consequences properly rest, with the parties concerned.

e. There are recommendations of a different character, which have been somewhat discussed in the English courts, such as to continue tenants and others in the occupation of premises devised, which have been held to create a trust on behalf of such persons.[53] And where one is designated as being continued in the office of agent, receiver, or steward of the testator's estates, it has been generally held to create an interest in such persons, which the courts of equity will enforce.[54]

f. But this rule has been considerably shaken in the case of

16 Sim. 1; Berkley *v.* Swinburne, 6 Sim. 613; Jones *v.* Greatwood, 16 Beav. 528; Hart *v.* Tribe, 18 Beav. 215; Wheeler *v.* Smith, 1 Giff. 300.

[52] 1 Jarman, ed. 1861, 374.

[53] Tibbits *v.* Tibbits, 19 Vesey, 656; Quayle *v.* Davidson, 12 Moore, P. C. 268.

[54] Hibbert *v.* Hibbert, 3 Mer. 681; Williams *v.* Corbet, 8 Sim. 349.

Lawless *v.* Shaw,[55] which occurred in Ireland, while Lord *St. Leonards* was chancellor there. The testator devised for life some of his estates, in trust, for the benefit of William Shaw, then aged twenty, with remainder over in strict settlement; with a special request that Lawless, his former steward and agent, should be continued, both by the executors, during the minority of the devisee, as well as by the devisee after he came into possession of the estates, which was not done; and the agent brought a bill to compel the performance. Lord *Plunkett*, M. R., decided against the prayer of the bill, and his decree was reversed by Sir *E. Sugden*, as Chancellor; but on appeal to the House of Lords, the decree of the Chancellor was reversed, and * that of Lord *Plunkett* affirmed.[56] The decision in the House of Lords seems to have proceeded somewhat upon the ground, that a gift of an estate to one person, is inconsistent with a direction that another shall have the management of it. Lord *Cottenham*, Chancellor, said: "If Lawless' title is what it has been argued to be, he has an equitable charge on the legal estate of Shaw," &c., arguing at length the absurdity of the testator having any such purpose, in expressing his particular desire to have him continued in the management and control of the estate. To all this we fully accede, but not upon any such ground as seems to have been uppermost in the mind of the learned Chancellor. To us there is no innate absurdity in one man having an equitable, any more than in having a legal incumbrance, upon the estate of another, or in its consisting in the right to manage and control it, for the benefit of another. This is always the case, in plain Saxon English, where an estate is conveyed to trustees for the benefit of others.[57] But if that had been the purpose of the testator, we confess it passes our comprehension, why he should choose to express it in this equivocal mode; or rather, we will say, not express it at all. It seems to us, the argument in the House of Lords is not well calculated to distinguish this from other cases of the same class; but rather to show that this entire class of

[55] 1 Ll. & Gould, 154.

[56] Lawless *v.* Shaw, 5 Cl. & Fin. 129.

[57] Lord Chancellor *Sugden*, in Lawless *v.* Shaw, 1 Ll. & Gould, 154, where his lordship said: "Then it is said, Suppose the testator recommended the devisee to employ a particular baker, or tailor; well, suppose the testator did make such a condition, in clear, express terms, for it would not be implied; *a man may devise an estate under any condition he pleases, provided it is not an illegal one.*"

decisions rests upon no satisfactory basis. To our mind, the argument of Lord *St. Leonards* is the more satisfactory, upon the basis of the former decisions being sound. But upon the theory, that the question is still open for consideration, as res integra, we accord to the House of Lords the credit of having shown very sufficient * grounds for disregarding all assumed trusts, resting upon mere words of wish, desire, prayer, or exhortation. And we are happy to hail the decision, as we do, as having virtually subverted the former rule upon that subject.

g. It seems to be settled in some of the American states, that in a general devise to the testator's wife, or to others, with the absolute power of disposition; that no trust arises from mere suggestions of the testator's confidence, that the devisee will make a particular disposition of the estate, at her decease, but that an absolute fee-simple is created.[58]

h. In some very late cases in England, a very decided inclination is manifested to give merely precatory forms of expression only their natural force. As where one was appointed residuary legatee of an estate, with the desire that the residuary estate be afterwards left, in the names of the testator and the legatee, to charitable purposes, it was held to raise no trust, but to operate as an absolute gift.[59] So also, in a late case in equity, in Ireland, it was held, that where the testator devised a dwelling-house to his wife, expressing "his earnest wish that his sister should reside in the house, with his wife, during her life," it was held to create no trust in favor of the sister.[60]

[58] Kinter *v.* Jenks, 43 Penn. St. 449, citing Heath *v.* Knapp, 10 Watts, 405; 4 Barr, 225.

[59] McCullough *v.* McCullough, 11 Weekly Reporter, 504.

[60] Graves *v.* Graves, 13 Irish, C. 182. It is said, that precatory words do not necessarily convert an absolute gift into a trust. Godfrey *v.* Godfrey, 11 W. Rep. 554. In Scott *v.* Key, 11 Jur. N. S. 819, where the testator made a devise to his wife, "being well assured that she will husband the means, that may be left to her by me, with every prudence and care, for the sake of herself and any children I may leave by her," and the devisee was held to take an absolute fee-simple. And in Hood *v.* Oglander, 12 Law. T. N. S. 626, where the testator devised lands to his son in fee, with an earnest request that he should not sell, alien, or dispose of the same, except by way of exchange or investment, and, if the devisee should die without leaving male issue, it was the testator's anxious desire that his son would so devise and settle the same, that they might continue in the name of the testator; and it was held to create no trust. And where the testator gave the residue of his personal estate to his wife, "for her own absolute use and benefit,

i. And where the testator placed a portion of his estate, constituting the equal share of a portion of his children therein, in the hands of trustees, directing them to pay over the income to such children or their issue, but giving them a discretion to withhold such portion of any share, as they might deem for the benefit of the cestui que trust, it was held that this did not give any discretion to withhold the whole income from any of the * beneficiaries, and add the same to income, but that such trustees were under the control of the court of chancery.[61]

k. The American courts have held bequests for merely conjectural objects, although resting in the discretion of the executors, or other trustees named for that purpose, void, upon the ground that a court of equity cannot administer the trust. Thus, where a bequest is made "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good," the

in the fullest confidence that she would dispose of the same for the benefit of her children according to the best exercise of her judgment, and as family circumstances might require at her hands," it was held that the widow was entitled for life, with a precatory trust in remainder in favor of her children. Shovelton *v.* Shovelton, 32 Beav. 143. And in a late case before Vice-Chancellor *Kindersley*, Evans *v.* Evans, 33 Law J. Chanc. 662, where the testator bequeathed his whole estate to his wife "absolutely, and to be by her willed to any or either of my children, in any manner suitable to her wishes, to hold to her forever." It was held that the wife took the property absolutely; but that a trust was ingrafted upon it for the benefit of the children who might survive her, with a power to appoint it among them by will as she saw fit. But it was considered that a will devising part of the estate to one of the sons in liquidation of a debt due him from the testator, or an agreement with another son that he should have the property upon the condition of paying the debt to the first son, and also stipulating for certain benefits to himself, could not be regarded as any exercise of the power.

And in Van Amee *v.* Jackson, 35 Vt. R. 173, it is said by *Kellogg*, J.: "In giving a construction to precatory words in a devise, a court of equity will look at the circumstances existing at the date of the will, and, if necessary, will construe words [ordinarily] importing a trust as mere expressions of recommendation or confidence."

Where the testator gave his personal estate to his wife, and expressed a "wish and desire" that all his real estate might be equally divided among his eight children named, it was held sufficiently dispositive to create a vested interest in the devisees from the death of the testator. Brasher *v.* Marsh, 15 Ohio, N. S. 103.

[61] Williams *v.* Bradley, 3 Allen, 270. The income accruing in the hands of the executor is subject to the same direction as that accruing after the fund is paid over by the executors. Ib.

Supreme Court of the United States held the same void for uncertainty, and decreed the property to the heir.[62]

l. Mr. Justice McLean, after reviewing the English cases, said, "From the principles laid down in the above cases, it is clear that the devise under consideration cannot be sustained. A trust is vested in the executor, but the beneficiaries are uncertain, and the mode of applying the bounty is indefinite. It is argued that the testator intended to give to the town of Alexandria, in its corporate capacity, the residuum of his estate. But he did not so express himself. On the contrary, it clearly appears, that the executors were made the repositaries of his confidence, and the only persons who were authorized to administer the trust; the cestuis que trust were the town, and the trade of the town. It would be difficult to express, in more indefinite language, the beneficiaries of a trust. How can a court of chancery administer this trust? On what ground can it remove the trustees for an abuse of it? . . . Without the application of the doctrine of *cy pres* it could not be carried into effect. In Virginia, charitable trusts stand upon the same * footing as other trusts, and, consequently, require the same certainty as to the objects of the trust, and the mode of its administration."

m. But in an early case in Connecticut,[63] it was held, in regard to the devise of the residue of an estate, to two of the testator's brothers, by name, and who were the executors of the will, "with full confidence that they will settle my estate, according to my will, and that they will dispose of such residue, among our brothers and sisters and their children, as they shall judge shall be most in need of the same; this to be done according to their best discretion:" 1. That a trust was created by the will, in favor of the brothers and sisters and their children; 2. That the executors and their children were not objects of the testator's bounty, and took no beneficial interest under the will; 3. That the estate given vested on the testator's death, in A., B., the executors, as trustees, for the use of the brothers and sisters and their children, to be by them enjoyed, as provided in the will; and that, consequently, after-born children, and those who became needy thereafter, could not take; 4. That the devise was not void for uncertainty in regard to the beneficiaries of the trust, as a rule was given by which they might be ascer-

[62] Wheeler *v.* Smith, 9 How. U. S. 55, 80.

[63] Bull *v.* Bull, 8 Conn. 47.

tained, namely, *the most needy* of the brothers and sisters and their children; 5. That the executors having died without having exercised the power, it was competent for the court of chancery to exercise it.

n. The subject has been before the same court in later cases. In Gilbert *v.* Chapin,[64] the testator devised all his estate, real and personal, after payment of debts, to his wife, "and to her heirs forever," recommending to her to "give the same to my children, at such time and in such manner as she shall think best." The testator left two children. The widow married again, and her second husband survived her. She having, by * will, left all her estate to the children of her first husband. It was decided that the widow took an absolute estate, in fee-simple, under the will of her first husband, not incumbered by any trust in behalf of his children, and, consequently, that the second husband acquired an estate by curtesy in the real estate so devised to his wife. In a still later case, Harper *v.* Phelps,[65] a somewhat similar question arose, and the court held, that where an annuity is left a person to enable him to maintain the testator's homestead in a condition to afford a home for his relatives, as he had done in his lifetime, somewhat, but the disbursement of the bounty is left in the absolute discretion of the legatee; it was held, that a court of equity could not control the exercise of such discretion: that to raise a trust it must be capable of ascertainment what proportion each beneficiary is to take; and that a court of equity will not raise a trust from words importing recommendation, hope, confidence, desire, &c., where the objects of the trust are not definite and certain; or where a clear choice to act, or not to act, is given; or where the prior dispositions import an absolute and uncontrollable ownership. This seems to be bringing the matter to the point of the English cases, already cited and commented upon. And similar views are maintained in other American cases.[66] But other American cases seem to have adopted the view of construing almost any wish or desire of the testator, into a trust, without regard to the question, how far he intended to control the conduct of the devisee or legatee.[67]

[64] 19 Conn. 342.

[65] 21 Conn. 257.

[66] Pennock's estate, 20 Penn. St. 268; Thompson *v.* McKisick, 3 Humph. 631.

[67] Collins *v.* Carlisle, 7 B. Monr. 14; Bull *v.* Bull, 8 Conn. 47. But the question is always one of construction, mainly, and no trust can be raised, if it appear

o. Where property is devised to one in trust, to be applied * toward the support of an insane pauper, as the trustee should judge right and equitable; provided the town, chargeable with the maintenance of the pauper, shall pay a reasonable sum annually for the same purpose; and a bill was brought by the town to compel the trustee to apply the income of the trust-fund toward the maintenance of the pauper: The court held, that the town had no such interest in the fund, as to enable it to maintain a bill, the pauper being the only cestui que trust, was the proper party, by her guardian, to bring a bill to enforce the trust. But, as the terms of the trust gave a discretion to the trustee, how much he would apply towards the support of the pauper, the court could not interfere, so long as that discretion was honestly and fairly exercised.[68]

that the testator meant to depend on the justice or gratitude of the donee to carry out his wishes. Erickson *v.* Willard, 1 N. H. 217; Lucas *v.* Lockhart, 10 Sm. & Mar. 466.

* [68] Sharon *v.* Simons, 30 Vt. 458. But see Heard *v.* Sill, 26 Ga. 302. There seems to be no doubt, that where a testator, intrusted with a discretion for the benefit of another, fails to exercise the same, properly, in the opinion of the court, they may compel the trustee to do what the trust, on a fair construction, requires. Prewett *v.* Land, 36 Miss. 495. Equity will appoint new trustees where the former ones refuse or neglect to act. Gamble *v.* Dabney, 20 Texas, 69. But where the matter rests entirely in the judgment and discretion of the trustee, and he acts in good faith and according to his best judgment, the question is not subject to revision in a court of equity. Hawes Place Society *v.* Hawes Fund, 5 Cush. (Mass.) 454.

*CHAPTER XII.

SUGGESTIONS TO THOSE EMPLOYED IN DRAWING WILLS.

1. The time of making wills, too often deferred till the testator is incompetent.
n. 1. Care should be exercised, not to assist in making a will, which is not the act of disposing mind, and memory.
2. Great care should be taken, that testators effect what they desire, or intend.
3. Testators often dependent, to a great extent, upon legal advice, as to the form of their wills.
4. Care is often requisite to translate the testator's language accurately.
5. Counsel should be careful to understand testators, and be understood by them.
6. Mr. Jarman's hints as to description of estates, intermediate profits, and charge for debts.
7. In relation to securing property to wife and children.
n. 4. It is always safe to advise testators against embarrassing the transmission of the title to estates.
8. No revenue-stamp required on will until the probate.
9. Will executed on the Lord's Day not invalid on that account.

§ 44. 1. It not unfrequently happens, that the most important act of a man's life, so far as mere property interests are concerned, is left to the very moment of death; or so near that fatal crisis, that no time or capacity for reflection or deliberation, either of the testator or his legal adviser, or next to none, remains. In regard to that considerably numerous class of cases, and one which we fear is not sensibly diminishing, we could give no advice which would be likely to prove of much advantage. All that then remains to be done, is, to make the best improvement of the short period of time remaining, always remembering to do nothing against one's clear convictions of right.[1] By this * we mean, never, out of ten-

*[1] We have ventured here to make a brief suggestion upon this not unimportant topic, because we have perceived a very marked contrast between the * reserve practised among English solicitors and legal advisers, in regard to assisting at the formal act of the execution of a will, by one evidently in articulo mortis; and the forwardness which is more commonly found among all classes, about the death-bed of any person in this country. We have thought this difference the result of wrong views on the part of the people of this country. We have no question it results from over-tenderness often. It seems to be supposed, by many, that aiding a man in performing the formal act of executing his will, is only one

derness towards the testator or the family, or from motives of delicacy, or reserve, to become * participators in a transaction which, in its most favorable aspect, is merely colorable.

2. But where the testator gives his instructions while in sound health, both of body and mind, and there seems no adequate motive either for haste or reserve, great care should be taken that the testator comprehends the full force of his acts. This may seem an unimportant suggestion, since it is generally supposed that most of the transactions connected with the making of a will are simple, and not susceptible of much uncertainty in their results. But this will be found to be, in general, a misapprehension; since it is the constant experience of those most employed in litigation, resulting from the settlement of estates, how very much disappointment of

of those offices of the death-bed which it would imply want of delicacy to withhold. And it is therefore often done, by the most upright and conscientious persons, without the remotest suspicion that there is the slightest hazard of thereby wronging any other person. But a moment's reflection will convince all, that this is not sure to be the fact.

A man is always supposed to desire to execute his will; and those about his death-bed who desire him to do so, generally urge him to execute it; because it will give the property of the testator a different direction from what it might otherwise have. The attempt, therefore, to execute a will for a dying man, or for any one in a state of mind where he is evidently not fully the master of his own acts, is an attempt to use the broken capacity of the testator, such as it is, for the purpose of diverting his property from those natural and ordinary channels, in which the wisdom of the law of the state has determined that it ought to flow; unless the owner, in a state of sound, disposing mind and memory, should otherwise determine. Any assistance, or countenance, therefore, which one consents to give on such an occasion, when reasonably convinced that the testator is not in the proper state to perform such an act, is so far consenting to aid in the accomplishment of an unlawful purpose.

When, therefore, one consents to become a witness to the execution of a will, and goes into court and testifies that he did not regard the testator, at the time of his attestation of the execution, as being in a state of mind suitable to the full comprehension and understanding of his act, he virtually declares his own infamy. But this is done, every day almost, in the American courts, without the remotest suspicion that there is any want of fair dealing in the transaction. We have alluded to the subject more than once, in this work, because we would be glad to correct what we regard as a vicious practice. It was decided, in Hampton *v.* Garland, 2 Hayw. 147, that the attesting witness to a will may be offered to prove want of sanity in the testator at the time of its execution, and there is no doubt of the correctness of the decision. But they might almost as well have * testified the instrument was a forgery, so far as their own credit was concerned. Ante, § 13, n. 3, p. 96–98.

the testator's expectations generally supervenes, in spite of all efforts of courts to the contrary. This is a remark constantly made by the English equity judges.[2]

*3. It is very justly said by Mr. Jarman, in his excellent suggestions upon this subject, that many men, when they sit down to the earnest work of making their wills, have such imperfect views of the mode of framing the instrument which they propose, that they are wholly dependent upon the counsel of their legal advisers.

[2] It would not afford much aid to the profession to enlarge upon this point. But we feel confident, that in the great majority of instances, where testators have resorted to any extreme provisions to produce, after their decease, any the most desirable ends, the lapse of time and the course of events have shown, how extremely short-sighted are all human devices to forestall consequences, by means of testamentary canons. The man who locks up his estate for three generations, or longer, in nine cases out of ten does his heirs no service, and entails an incumbrance upon his estate, of vastly little utility to any one. The gentleman who undertook to insure protection, for a long life, to his favorite Newfoundland, who, in an emergency, had saved his own life; and who, by over-caution, so framed the provisions of his will that the payment for the last month of the animal's life would absorb nearly his whole estate of more than $100,000; thus affording the very motive for the destruction of his favorite, which he so studiously labored to avoid, is by no means a solitary case. The books are full of similar illustrations.

There seems to be a kind of fatality, as Plato would have called it; or, as a Christian ought to say and believe, a kind of special Providence, attending this class of cases. Where the testator struggles with the utmost pertinacity to disinherit a child, or other heir, hemming the exclusion round with all manner of ingenious devices, to render his purpose doubly secure; this very extreme caution, and the strange and causeless labor thus taken to secure an unwise or a vicious result, has proved the occasion for a jury to declare the entire will void, as the offspring of a diseased or a perverted mind.

But in less extreme cases, it is every day's experience for a testator to make all the provisions of his will, upon the basis of his wife and all his children necessarily surviving himself, and then dying, one after the other, in the precise order of seniority, and all his children leaving issue; when, if this order of events fails to occur, precisely as marked out, half the provisions of the will become unintelligible or impossible.

It becomes, therefore, the duty of solicitors employed to draw wills, to be watchful of any such delusion resting upon the mind of the testator, and, when they perceive it, make such suggestions as will open his mind to the supposable contingencies of future events, and thus give him the opportunity to provide for them. Much of the litigation in testamentary causes arises from the want of declaring the mind of the testator, in an event not in his apprehension, but which in fact occurs. In such cases, the courts cannot do what they may suppose the testator would have done, since this would be making his will, to that extent, and not declaring it.

It becomes, under such circumstances, a very important office to give proper advice, and above all, to assure one's self that the form adopted, is not only suitable and proper for the end proposed, but that it fully and precisely expresses the purpose of the testator.

4. There is another category, of not unfrequent occurrence, in preparing testamentary papers. The testator, from want of acquaintance with the proper mode of expressing his intentions, and from long study and reflection upon the subject, may have fallen into an involved and complicated mode of stating a very simple thing. If, then, the draughtsman, as is very common, falls * into the mere routine plan of writing, as nearly as practicable, the very words of the testator, without any effort to get at his real purpose, the result will generally be that the instrument itself will be dark, confused, and incomprehensible. Whereas, on the contrary, a slight effort of the draughtsman would have enabled him to learn, with precision, the exact purpose of the testator, and using his own language, without a too strict copying of the words of the testator, might have saved litigation, or secured important rights, which failed, for want of such circumspection on his part.

5. Two leading points are essential in this matter of framing wills for others: 1. That the legal adviser fully possess himself of the real purposes of the testator. 2. That he become reasonably certain, before he allow the instrument to pass to its final authentication, that the language which he adopts, in expressing what he believes to be the intention of the testator, is perfectly comprehended by him. And to secure this end, it becomes of cardinal consequence, that he should adopt the plainest and least involved mode of composing the instrument; and also, that he avoid the use of unusual technical expressions, as far as practicable; and that where this does not seem practicable, he should clearly explain the force and effect of such language, not only in regard to probable and naturally expected contingencies, but also in regard to such as are less likely, but possible, to intervene; so that the testator may surely comprehend and fully understand the import of the language put into his mouth, upon so solemn an occasion,[3]

[3] The careful examination of the reported cases in regard to testamentary dispositions of property will convince any one, that had the testators been fully and correctly informed, in regard to the full force and legal effect of their language, they would have adopted such explanations, as to have avoided all uncertainties, upon the very points which have caused the most extended controversy. One

which, from a somewhat extended * experience in the trial of testamentary causes, we feel sure is not always the case.

6. Mr. Jarman mentions the following considerations:

(1.) That in the devise of real estate, care be taken to secure accurate description; and that where the same estate is described by boundaries, and the name of the occupant, especial watchfulness be exercised, that both precisely concur, since more controversy arises out of such discrepancies, than from any other one source.

(2.) That where an estate is devised to a class, not certain to be in existence at the decease of the testator, as to the * children of A. who may have none at that time, provision be made for the disposition of the intermediate profits of the estate.

(3.) That where any particular funds are set apart for the payment of debts, it should be clearly defined, whether it is the intention of the testator thereby to exonerate the general personalty from being primarily liable to that charge. He also names the case of mortgaged estates, already alluded to.

familiar illustration now occurs to us, in the devising of estates, * incumbered by mortgages, which has caused so much uncertainty and litigation, that the former rule has been changed, in England, and in some of the American states.

It was formerly held, that if the incumbrance was the debt of the testator, it must be paid by the executor out of the personal estate, thus enabling the devisee to take the estate freed of the incumbrance, while, if it was the debt of another, having constituted an incumbrance at the time of the purchase by the testator, it was not a primary charge upon the personalty in the hands of the executor, and consequently the devisee must take the estate subject to the incumbrance. This is a state of the law not likely to occur to unprofessional minds, and probably not one testator in a thousand would take account of any such contingency, in making his will, unless it were pointed out to him by his solicitor.

This shows the necessity for those, who undertake the office of preparing wills, being well informed upon questions liable to arise in the course of the ultimate settlement of the estate; and also of being watchful to see that their clients are well instructed in regard to such questions. And we trust it will not be regarded as altogether out of place here, to suggest to the profession, and to their clients, that the practice of drawing wills for the insignificant pittance which is too often accepted for such service; in some cases, not much more than the value of the mechanical labor involved; is both degrading and unjust, to a highly honorable and useful profession; and which is liable, on that account, to be overcrowded by aspirants for its honors and emoluments; whose debasing practices to secure employment, show that, although in the profession, they are not properly of it.

7. So also in relation to the objects of the testator's bounty, some degree of circumspection may be requisite. In securing an estate to the wife and children of the testator, it will often be of essential advantage to suggest the more common modes of effecting the purpose; as by vesting the whole estate in the wife, during life; and with the power of appointing the same to the children, in such proportions as she may deem most just and useful; or by providing, that the children shall share equally in the remainder, after her decease; but no child shall have any share until after majority, or marriage.[4]

[4] The purposes and wishes of testators are so various in regard to making provision for one's family, that nothing approaching certainty could be suggested in any general view of the subject. But in this country, where any thing approximating permanency of investment must be regarded as the exception, rather than the rule, it has always seemed to us, that everything of the character of complicated or restrictive provisions, in regard to the alienation of estates, was more liable to lessen the value of the estate to the devisee, than to secure an equivalent advantage by means of its longer enjoyment. There should therefore, as a general thing, be lodged somewhere, a discretionary power of alienation, when the interest of the devisee imperiously demands its. There is a strong proclivity in the human mind to fasten the most unlimited restrictions upon property bequeathed. But all such things, in this country certainly, savor more of the vanity and conceit of the testator; or of his want of trust in the upholding care and protection of an overruling Providence, than either of wisdom or prudence.

But, after all, it is not to be expected that mere legal advisers can exercise much control over the character of testamentary dispositions; and many might think it undesirable that it should be so. We have, nevertheless, experienced, in many instances, the very great benefit of wise and judicious counsels upon such subjects. And we make no question, that if more freedom were felt and exercised upon such subjects, it would be found useful.

The following are Mr. Jarman's concluding suggestions upon this subject:

1. "The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are, at what ages their shares are to vest; whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? Whether, if any child die in the testor's lifetime, or subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

8. It may not be regarded altogether unimportant to name here, that the Supreme Court of Pennsylvania[5] have decided that it is

2. "If any of the objects of the gift (whether of real or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise, or bequest, to children, it should be suggested, whether their shares are not to be placed out of the power of husbands; i.e. limited to trustees for their separate use for life, subject or not to a restriction on alienation (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence), with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retraction, it should be confined to dispositions *by will*, which, being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property.

3. "If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions), whether they are to be limited to uses to bar the dower of any wife to whom he was married, on or before the 1st of January, 1834.

4. "If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, when survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenacy, which may be severed.

5. "In all cases of limitations to survivors, it should be most clearly and explicitly stated to *what period survivorship is to be referred;* that is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees, or legatees, among surviving or other objects, does not overlook the possible event of their leaving children, or other issue. There can be little doubt, that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects, that they should be living at a prescribed period posterior to the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

6. "It may be observed, that where interests not in possession are created which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

7. "Where a testator proposes to recommend any person to the favorable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee, or legatee, in favor of such person, or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words

[5] Werstler *v.* Custer, 46 Penn. St. Rep. 502.

not essential to the validity of a will that it should have any revenue-stamp attached at the time of its execution. And it is added, arguendo, by the court, that if any such stamp is required, in the case of a will, the register of probate should affix it before he issue the probate in connection with the letters testamentary; and it would seem very obvious, from the provisions of the United States statute, that no such stamp is required to be attached in the case of the probate of a will and letters testamentary beyond what is required in the ordinary case of letters of administration.[6]

9. For the want of any more appropriate place, we here refer to a recent decision in which the question was raised in regard to the

negativing such a construction of the testator's expressions should be used. Equivocal language, in these cases, has given rise to much litigation.

Lastly. "It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, that may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened, that a testator has left a child en ventre sa mere, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children, generally, will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life-interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

"To the preceding suggestions, it may not be useless to add, that it is in general desirable, that professional gentlemen, taking instructions for wills, should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court, Rogers *v.* Pittis, 1 Add. 46, Sir *J. Nicholl* 'admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, *à fortiori*, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or, in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed de facto as a will at all.'"

[6] Session Laws, 37 Congress, Sess. 2, ch. 119, 1862, Schedule B, Probate of Will.

validity of a will executed on the Lord's Day.[7] It is here shown, in an elaborate and most satisfactory opinion of the learned Chief Justice *Bigelow*, that the execution of a will on the Lord's Day, by the testator, is not "work, labor, or business," within the Massachusetts statute for the due observance of that day, and that a will so executed is not thereby invalidated.

[7] Bennett *v.* Brooks, 9 Allen, 118.

*CHAPTER XIII.

APPENDIX.

FORMS OF WILLS AND FAMILY SETTLEMENTS, ETC., WITH NOTES.

No. I.

In the name of God: Amen. I, A. B., being in sound health of body, and of disposing mind and memory, do make and publish this my last will and testament; hereby revoking all former wills, by me at any time made. I commend my spirit to my merciful Creator, Redeemer, and Sanctifier, and in the hope of a joyful resurrection, I commit my body, in Christian burial, to the earth, in the church-yard of St. Paul's Church in ———, according to the direction and discretion of my executors hereinafter named.[1]

*1. I direct that all my just debts, including funeral expenses and the expenses of administration, be paid by my executors.[2]

*[1] These formalities were, for many years, almost universal in the English practice. But they are now but seldom found in English Wills. Hayes & Jarman's Concise Forms of Wills, p. 102 et seq. It is common, in drawing wills, for those in declining health, or in extreme sickness, to advert to that fact, in the introductory part of the instrument, as coming nearer to what the testator himself might be expected to say, if he were his own amanuensis; thus:

I, A. B., "being in declining health;" or "laboring under a severe and painful malady;" "but in my own apprehension and belief, in the full and perfect possession of my mental faculties," &c.

But there is such a disposition among men, even those who have no real feeling of seriousness, upon any subject, to flatter themselves that they are setting an example of becoming solemnity, when they give utterance to sad and sombre words; that it often causes a shrinking, with the earnest-minded and truly thoughtful, from giving utterance to any such words, even in the solemn act of indicting their own testaments, lest they might be suspected of affectation. It is of some consequence, therefore, to suit these matters, as far as practicable, to the taste of the testator. But in drawing wills, we have, more and more, of late, especially, fallen into the use of the English practice of introducing a will in the simplest form, as in No. II., and the following forms. The following is as good form as can be adopted:

"I, John Doe, of Boston, in the Commonwealth of Massachusetts, do hereby make and publish my last will and testament, intending thereby to dispose of all my worldly estate, of which I shall be possessed at the time of my decease."

[2] The direction for the payment of debts and funeral expenses and those of administration, is now merely formal, except that as it may sometimes aid in the construction

2. I BEQUEATH to my beloved wife (A. B.), one thousand dollars, annually, in equal quarterly payments, in advance, reckoning from the first day of January in each year, as the means of supporting herself and family, so long as she remains my widow, the first payment, for the current quarter, to be made within one month after my decease. *I also give and devise to my said wife the use of my mansion house in ——, free of rent, and expenses of repairs and taxes, during the term of her natural life, to be occupied by herself, or any other person to whom she shall give permission.[3]

3. I DEVISE and BEQUEATH all the residue and remainder of my estate, both real and personal, to my children which shall survive me; and to the legal issue of any deceased child or children, by way of representation of such child or children, and to the heirs and assigns of such children forever, in equal parts.

4. If none of my children shall survive me, and there shall, at my decease, remain no issue of any of my deceased children, then I DEVISE and BEQUEATH all such residue of my estate to such persons as may be my lawful heirs and distributees, at that time, to be distributed according to the statutes then in force; or to such charitable and religious societies as are hereafter named, in proportion to the several sums attached to the names of such societies respectively. And I hereby appoint A. B. the executor of this my last will. In witness whereof, I have hereunder set my hand, this —— day of ——, in the year of our Lord ——.

(Signed) [Testator's signature.]

* Signed, by the said testator [name], as and for his last will and testament, in the presence of us, who, at his request, in his sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses.[1]

(Three witnesses.)

of a will, by showing that the subject of the testator's debts was brought distinctly to his mind, at the time of executing his will.

[3] This is as convenient a form of indicating provisions for the widow, as any other. Such provisions are so infinitely various that no general form could afford more than an example.

*[1] Messrs. Hayes & Jarman, in their book of Forms of Wills, suggest, with great propriety, that, in the selection of witnesses, those of intelligence and respectability should be preferred, and when practicable, professional men; inasmuch as their attestation of the will, by a formal clause of attestation, tends very strongly to show that all the formalities therein enumerated were duly complied with. *It is of some importance, too, especially in large towns, and in a country, where the population is proverbially migratory, to select such, as might readily be found, to prove the execution of the will at the time of probate.

It should be borne in mind, too, that in most of the states, those taking any benefit

* No. II.

COMMON FORM OF WILL.

1. I give, devise, and bequeath unto my beloved wife (A. B.), all my remaining estate, both real and personal, in whatever it may consist, or wherever situated, at the time of my decease, to be by her used and disposed of, during her natural life, precisely the same as I myself might do, were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living; and to distribute [1] the same by gift, or otherwise, among

under the will, are either excluded from being witnesses of its execution, or else any provision in their favor is rendered void. And the same rule of exclusion extends to the wife or husband of such beneficiaries. Ante, p. 257, 258. An executor is a competent witness, unless disqualified by commissions, or liability for costs. Ante, p. 258, 259. But it is advisable on many accounts, that executors, and trustees under the will, should not be witnesses to its execution.

The use of a seal is not required by the statute of frauds, or by the statutes of most of the American states. But its use has become very general, on account of powers of appointment generally requiring to be executed under seal. The use of a seal is, therefore, indispensable in their execution by will, although not requisite to the validity of the will in other respects. If, therefore, the testator has any power of appointing property, under any prior will or settlement, it may be well to use a seal, unless the power is present, and it appears no such formality is required in its execution. West *v.* Ray, Kay, 385.

As under the present English statute, wills of personalty are required to be executed with the same formalities as other wills, it has become a frequent practice there, to have instructions for preparing wills, and all correspondence between testators and the intended beneficiaries under their wills; and which, from the peril of sickness, or other casualty, may fail of being carried into effect, by reason of not being reduced to the requisite statutory form; to have all such provisional testamentary acts executed before the requisite number of witnesses, and with all due formalities, so as to be operative, as testamentary dispositions, in the event of any accident occurring to prevent the due execution of the more formal instrument, in contemplation. Hayes & Jarman, 105; ante, pp. 180, 181, 182.

*[1] Such a gift, although conferring the entire power of disposition upon the wife, during her life, and of appointment by will, does not absolutely destroy all remainder, so that the devise over will, in the event provided for, take effect in favor of the children and their legal heirs and representatives.

But the wife should, in such case, be made one of the executors and trustees under the will, so as to carry the intermediate estate up to the time of the remainder vesting in possession. And in order to preserve the trusts in behalf of the daughters, there should be other executors and trustees associated with the wife, to preserve the legal title in remainder of the share of the daughters.

For if the share of any child, or other person, entitled in remainder, or to the absolute control of the estate, shall once absolutely vest in them, in possession, the limitations upon their enjoyment of the same might be held void, on the ground of repugnancy; and upon the share vesting in such daughter, independent of all trust restrictions upon the right of their husbands, such restrictions and the provisions for the

my children at any time during her life, as to her shall seem meet and proper; and to appoint the same among my said children, by will, after her decease, according to her own judgment and discretion.

2. But if any of my said estate shall remain undisposed of by my said wife, at the time of her decease, I give, devise, and bequeath all such residue and remainder of my said estate, to be equally divided among my children, who shall be living at that time, and the issue of any child, who * may have then deceased; such issue taking the share to which such deceased child would be entitled, if living.

3. But I hereby DIRECT, that the share of any of my daughters, who shall be then living, shall not absolutely vest in any such daughter, but her share shall be retained by my executors and trustees, for the time being, whether appointed by me, or by the proper tribunals of the state, and put at interest, or upon rent, and only the income thereof paid to my said daughters, or any of them, during their natural lives, and after their decease, the whole shares of such daughters, or either of them, to be equally distributed among their and each of their lawful heirs, according to the laws of this state. And I hereby expressly direct, that no part of the share of any of my said daughters, or of the income thereof, shall be in any manner subject to the control of any husband of any of my said daughters, or liable under any mortgage, pledge, or other contract of such husbands, or in any manner liable for any debt of such husband. But my trustees shall retain the entire property of the share of any of my said daughters, whether it be of real or personal estate, during the life of said daughters, and pay over the use and income thereof, quarterly, or oftener, as may be convenient for them, into the hands of my said daughters, or any of them, upon their own sole receipt therefor. And I hereby appoint, &c. In witness whereof, &c.

No. III.

DEED OR WILL IN TRUST.

I, A. B., of, &c., do hereby give, grant, alien, convey, and confirm, &c., or devise and bequeath unto A. B. and C. D., of, &c., and their heirs, the following described real and personal estate:

distribution of such share among the heirs of such daughters, might, by some courts, be held inoperative, as an illegal restraint upon the enjoyment of an absolute bequest. At least, as some of the state courts have so held, in cases very similar, it is prudent to guard against any such possible contingency, keeping the legal title in the hands of trustees, for the purpose of supporting the equities declared in the will.

or the residue and remainder of all my estate, real and personal, of which I shall die seized and possessed, after the payment of my debts and the expenses of administration, together with such legacies and bequests as are herein before made; or as I have made in my will, bearing even date herewith, together with any codicil which I may hereafter add to the same; or as I shall hereafter make by any will or codicil remaining unrevoked at the time of my decease.

In trust: For the following purposes.

* 1. To pay my dear wife, A. B., for, and during the term of her natural life, one thousand dollars annually, in equal quarterly payments, reckoning from the first day of January in each year, the first payment to be made within one month after my decease, for the current quarter.

2. To pay the expense of supporting, maintaining, and educating each and all my said children, in such manner as my wife, with the advice of my trustees, shall deem suitable and proper, until the sons shall arrive at the age of twenty-one years, and the daughters shall arrive at that age, or shall marry.

3. To pay to each of my sons at the age of twenty-one years, and during his natural life thereafter, each and every year, in equal quarterly payments, reckoning from the first day of January, one thousand dollars, the first payment, for the current quarter, to be made within one month after my sons shall severally arrive at majority; and to pay the same sum to my daughters, respectively, in the same manner, upon their marriage or arriving at the age of twenty-one years, whichever shall first happen.

4. Upon the decease of any of my said children, leaving issue, to pay the said sum of one thousand dollars annually to such issue or to the legal guardian of such issue, in the same manner any of my said deceased children would have been entitled to receive the same, if still living.

5. Upon the decease of the last surviving one of my children, my trustees shall convey all the remaining part of my estate hereinbefore conveyed to them, together with any income of the same remaining in their hands, to the heirs and legal representatives of my deceased children, in equal shares, according to the number of my deceased children so represented, such heirs and legal representatives taking by way of representation, and not according to their number. And I hereby appoint, &c. In witness whereof, &c.

In this manner the trusts may be made more or less numerous and extended.

No. IV.

WILL GIVING TO ONE ABSOLUTELY ALL THE TESTATOR'S REAL AND PERSONAL ESTATE.

This is the last will and testament of me [testator's name and residence]. I devise and bequeath all the real and personal estate to which I shall be *entitled at the time of my decease, unto [devisee's name and residence], absolutely; but, as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively. And I appoint the said [name] sole executor of this my will, hereby revoking all other testamentary writings. In witness whereof, &c.

No. V.

WILL DISPOSING OF REAL AND PERSONAL ESTATE IN FAVOR OF TWO SONS, OF WHOM ONE IS AN ADULT AND THE OTHER A MINOR; GIVING TO THE DEVISEES A POWER OF APPOINTMENT OVER THE REAL ESTATE. DIRECTION TO PURCHASE A LIFE ANNUITY.

This is the last will and testament of me [testator's name and residence]. I devise the dwelling-house at ——, in which I now reside, with the garden, orchard, and the appurtenances thereto belonging, and also the pieces of land called respectively [names], now in my occupation, situate in the said parish of ——, with the easements and appurtenances therewith usually occupied or enjoyed,[1] unto my eldest

* [1] There is often great uncertainty in regard to the scope of the subject-matter of the bequest. 1. Whether the words include both real and personal estate. The words "estate," "property," and "effects," unless associated with some restrictive term, are broad enough to include every species of property. Where wills are drawn by professional men, there is often some inference in regard to the nature of the gift, to be gathered from the words of gift, as "*I devise*" is applied more commonly to realty, and "bequeath," or "give," to personalty. Ante, p. 5, et seq.; Stokes *v.* Salomons, 9 Hare, 75; Phillips *v.* Beal, 25 Beav. 27. But see Coard *v.* Holderness, 20 Beav. 27.

The words "estate," and "property," may be restrained by the context. Timewell *v.* Perkins, 2 Atk. 102; Doe *v.* Rout, 7 Taunt. 79; Doe *v.* Hurrell, 5 B. & Ald. 18. The words "I constitute A. and B. my residuary legatees," will not give them the testator's real estate. Windus *v.* Windus, 21 Beav. 373. But as words may be restrained, so they may be enlarged, by the context. And even the words "personal estate," by the context, has been held to pass realty. Doe *v.* Tofield, 11 East, 246. So the word "lands" has been held to embrace houses. But to avoid all questions, it is desirable to

son [name], his heirs and * assigns. And I devise my messuage and lands situate at ——, now in the occupation of [tenant] under a lease, with the easements and appurtenances therewith usually occupied or enjoyed, to my younger son, &c. But in case my said younger son shall die under the age of twenty-one years, then I devise the last-mentioned hereditaments and premises, in the same manner as hereinbefore is expressed concerning the other hereditaments and premises hereinbefore firstly devised. And in case my said * younger son shall at my decease be under the age of twenty-one years, I empower and direct my executors or administrators, executor or administrator, for

use more specific terms, such as "tenements" and "hereditaments," or "real estate," where any attempt is made at specific description. Hayes & Jarman, 109, note.

The word "premises," although more commonly used to signify real estate, especially in popular language, in the American states, as "the premises upon which the testator lived;" in strictness, signifies what has gone before, and may, therefore, with propriety, be used with reference to any preceding subject. As where the testator had devised a messuage and the furniture in it, for life; and after the termination of the life estate, then over, by the words, "said messuage and premises," it was held to carry the furniture. Sandford *v.* Irby, L. J., O. S. 23; Doe *v.* Meakin, 1 East, 456; Fitzgerald *v.* Field, 1 Russ. 427; Hayes & Jarman, 109 and note.

Great care should be used in regard to terms having reference to former, or after portions of the will, to have the precise matters referred to, clear and definite. Thus the word "share," or other similar term, is not always precise and definite, as to whether it refers to one, or more than one, of several preceding subjects of gift. See Goodwin *v.* Finlayson, 25 Beav. 65; Evans *v.* Evans, id. 81; Hayes & J. 110 and note. Words of locality in description should be *precise* and accurate. Thus the term, "near Maldon," was held not to include a close four or six miles off. Doe *v.* Pigott, 1 J. B. Moore, 274. And if there is something nearer, answering the term "near," it will not be so far extended as it otherwise might be. Doe *v.* Bower, 3 B. & Ad. 453. So that the term is altogether too loose to be relied upon in a will.

Words of occupancy should not be added to the description of real estate, unless it is very certain the occupancy is precisely coextensive with the name or description of the estate before given. For if they coincide they add nothing, and if they do not, it only tends to produce uncertainty; as such words are regarded, as not restrictive, but only falsa demonstratio quod non nocet. Doe d. *v.* Carpenter, 16 Q. B. 181; s. c. 1 Eng. L. & Eq. 307; Goodtitle *v.* Southern, 1 M. & S. 299.

But if the principal description of the estate consist in the occupancy, as all my estate, in the town of A, in the occupancy of B, or in my own occupancy; this will not include a messuage, not in the occupancy described. Doe *v.* Parkin, 5 Taunt. 321; Doe *v.* Ashley, 10 Q. B. 663; Doe *v.* Hubbard, 15 Q. B. 227.

An exception from a general bequest should be written down with care, so as to be transparently clear and definite. For an indefinite exception is often drawn in to enlarge the general gift to which it is attached. As where the testator excepts what the bequest would not include. Hotham *v.* Sutton, 15 Vesey, 319. And such general words as "chattels," or "effects," which, standing alone, would be sufficient to carry all the personalty; by being associated with household goods, or other words of limited extent, have been restrained to matters, ejusdem generis. Ante, p. 441 and note; Rawlings *v.* Jennings, 13 Vesey, 39.

the time being, during his minority, to let from year to year, or for any term not exceeding [seven] years in possession, at the best rent, and to manage in all respects the hereditaments hereinbefore devised to him, and to receive the rents and profits thereof, and after payment of the incidental outgoings and expenses, to apply the net rents and profits, or an adequate part thereof, in his maintenance and education, and to invest the unapplied surplus, if any, in or upon the public funds or securities of the United Kingdom, or real or leasehold securities in England or Wales (and not in Ireland or elsewhere), and improve the same as an accumulating fund, varying the investment from time to time, as often as may be thought proper, for any other of the kinds aforesaid; but with liberty to apply the income, and, if deemed necessary, the capital also, of the same fund, for the maintenance or advancement in life of my said son; and the same fund, or so much thereof as shall not be so applied, shall, in the event of his attainment of the age of twenty-one years, be his absolute property; but in the event of his death under that age, shall be the absolute property of my said elder son I direct my executors to purchase, within twelve calendar months after my decease, in the name and for the benefit of my servant [name], an irredeemable annuity of 20*l.* for her life, payable in equal half-yearly or quarterly portions, such purchase to be made in the discretion of my executors, either from Government or any public company, or from any private person or persons, but so that the annuity, if purchased from any person or persons, shall be well secured on freehold, copyhold, or leasehold, property. And I direct that until such purchase shall be made, a like annuity shall be paid her out of my general personal estate, in equal quarterly portions, the first portion to be paid at the end of three calendar months from my decease; And I declare, that the said annuitant, or her executors or administrators, shall not be allowed to have the value of the said annuity in lieu thereof. I give to my said younger son, if he shall attain the age of twenty-one years, the sum of 2,000*l.* Consolidated Three per Cent Annuities, to be transferred to him within three calendar months after he shall attain that age, or, if he should attain it in my lifetime, within three calendar months after my decease. I direct that the legacy duty and expenses incident to the bequests of the annuity and stock legacy, hereinbefore respectively * bequeathed, shall be paid out of my residuary personal estate. As to the residue of the real and personal property whatsoever and wheresoever which may belong to me at my decease, I devise and bequeath the same to my said elder son, his heirs, executors, and administrators, absolutely; but subject as to property vested in me as trustee or mortgagee, to the trusts and equities affecting the same respectively. I appoint my said elder son and [names] the executors of this

my will, with power to compound debts and settle claims against or in favor of my estate, and to retain and allow to each other the expenses of executing my will; And I constitute my executor or executors for the time being guardians or guardian of my said younger son during his minority. Lastly, I revoke all former wills, and declare that this writing, consisting of three sheets of paper, contains the whole of my will. In witness whereof, I have hereunder set my hand, and I have also set my hand to each of the preceding sheets of this my will, this —— day of ——, in the year of our Lord ——, &c.

No VI.

WILL DEVISING REAL ESTATE TO TRUSTEES.

Will devising real estate to trustees, upon trusts for raising money, by mortgage, in aid of the personal estate, to pay debts and legacies; and, subject thereto, for the testator's son and his issue, in strict settlement; and, failing such issue, for raising certain sums; and, subject thereto, for collateral relations. Power of leasing. Specific bequest of leasehold for years, and other specific legacies. Bequest of annuities and pecuniary legacies. Devise of mortgage and trust estates. Power to give discharges to mortgagees and others. Power to appoint new trustees.

This is the last will and testament of me [testator's name and residence]. I devise all the freehold and copyhold manors, messuages, lands, tenements, and hereditaments, to which I may be entitled at my decease, with their appurtenances, unto and to the use of [trustees], their heirs and assigns, upon the trusts following; (namely), upon trust, in the first place, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same or a competent part or parts thereof, to raise, in aid of my personal estate (if insufficient), so much money as shall be requisite to satisfy my funeral and testamentary expenses and debts, * and the annuities and pecuniary legacies hereinafter bequeathed, together with the expenses of executing this trust, and to apply the money to be so raised accordingly; And, subject thereto, in trust for my son (name) and his assigns during his life, without (as to the said freehold hereditaments) impeachment of waste. And immediately after his decease in trust for the first and every other son successively, according to seniority of birth, of the said [son], and the heirs (*or*, heirs male) of the body of each such son. And, failing such issue, in trust for the daughters of my said son, equally, as tenants in common, and the heirs of their respective bodies, with trust limitations in

the nature of cross remainders between such daughters and the heirs of their respective bodies, as to both the original and the accruing shares. And, failing such issue, upon trust, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same or a competent part or parts thereof, to raise and pay to the respective persons or classes of persons next hereinafter named or described, if living at the time of the failure of the antecedent trusts, the respective sums of money which immediately follow their respective names or description (viz.), [name, &c.], $——; [name, &c.], $——, &c. The children of my sister [name], who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, $—— apiece. The children of, &c., $—— apiece. And, subject thereto, as to one undivided moiety of my said devised estates, in trust for my brother [name], his heirs and assigns. And as to the other undivided moiety thereof, in trust for my nephews [names], equally, as tenants in common, their respective heirs and assigns. And I empower my trustees or trustee for the time being, during the life of my said son [name], with his consent in writing, and after his decease and during the minority or respective minorities of any infant tenant or tenants in tail for the time being, entitled under the trusts aforesaid, in the discretion of such trustees or trustee, to grant leases of my said devised estates or any part thereof (but, as to my said copyhold estate, first obtaining the requisite license or licenses), for a term or terms not exceeding [twenty-one] years in possession, at the best rent or rents, to be incident to the immediate reversion, without taking any fine or premium. I devise the leasehold messuage in which I now reside, situate at ——, and held by me under a lease dated, &c., with the appurtenances, to my wife [name], for her life, if my term therein shall so long endure, and, after her decease, to my said son [name], his executors, administrators, and assigns, for the then residue, if any, of such term. I bequeath the several specific legacies following (viz.): "To my said wife, all the wines, fuel, liquors, and other consumable household stores and provisions which shall belong to me at my decease, for her absolute use; To, &c. I bequeath to the several persons next hereinafter named, for their respective lives, the several annuities of sterling money which follow their respective names (viz.): To my said wife $—— a year, in addition to the provision made for her by the settlement on our marriage. To each of my sisters [names], $—— a year; To, &c. And I direct such annuities to be paid in equal portions quarterly, on the four most usual days of payments of rent in the year, and the first quarterly portion to be paid on such of the said days as shall occur next after my decease; but no proportions of the said annuities shall be payable for the days elapsed at the deaths of the respective annuitants of the then

current quarter. And I direct funds to be appropriated in the names or name of my trustees or trustee for the time being, out of my personal estate (but not by mortgaging or charging my real estate), sufficient at the period of appropriation, to answer, by means of the income thereof, the payment of the same annuities; which funds, on the dropping of the respective annuities, shall follow the destination of the residue of my personal estate. I bequeath to the several persons next hereinafter named the several legacies of money which follow their respective names (viz.): To my niece [name], in addition to the provision made for her by the settlement executed by me on her marriage, the sum of $——. To my niece [name], the sum of $——, (in satisfaction of a legacy bequeathed to her by the will of ——, and received by me). To my nephew [name], the sum of $—— (which legacy, together with the sum of $——, advanced by me for the purchase of his commission in the army, makes up the sum of $——, which I originally promised to leave him). And I direct the said pecuniary legacies to be paid at the end of —— calendar months next after my decease. And I declare, that such of the annuities and pecuniary legacies hereinbefore bequeathed as shall lapse or fail by the deaths of legatees in my lifetime, or otherwise, shall, so far as the same may charge or affect my real estate, lapse or fail for the benefit of my devisees, and not of my heir. I bequeath the residue of my personal estate unto my said son [name], for his absolute benefit. I devise all the real estate vested in me as * mortgagee or trustee to my said trustees, their heirs and assigns, subject to the trusts and equities affecting the same respectively. I declare, that any mortgage made by the trustees or trustee for the time being of my will may, in their or his discretion, contain a power of sale. And I further declare, that the receipts of the trustees or trustee for the time being of my will, shall effectually exonerate mortgagees and others paying moneys to such trustees or trustee from all liability in respect of the application thereof; also, that every mortgage and charge to be made or created by my trustees or trustee for the time being, shall, in favor of the mortgagee or lender, be presumed to be necessary and proper. I empower my said son [name], during his life, and, after his decease, the trustees or trustee for the time being of my will, if any, or, if none, the executors or administrators of the last deceased trustee, or either or any of such executors or administrators, to nominate, in writing, any person or persons to supply the place of any trustee or trustees of my will, who shall die, whether in my lifetime or after my decease, or disclaim, or be unwilling or unable to act. And on every such appointment the necessary assurances shall be executed for vesting my trust estate in the new and old trustees, or in the new trustees solely, as the case may be. And I absolve the trustees and trustee for the time being of

my will from responsibility for the receipts and defaults of each other, and for involuntary losses. And also authorize such trustees and trustee to retain and allow to each other all expenses incurred in or about the execution of the trusts of my will. I appoint [trustees] to be executors of my will. And lastly, I revoke all former wills, declaring this writing alone to express the whole of my will. In witness,[1] &c.

[1] It is well to bear in mind, that where legacies fail, from illegality, or lapse, or any other cause, as a general thing, the amount of such legacy goes to swell the general residuum, all of which, with all such incidental accessions, will go to the residuary legatees, so that the residuary clause will pass all of the personalty that is not *effectually* disposed of otherwise. Brown *v.* Higgs, 4 Vesey, 708.

But in regard to real estate the rule is different. And a legacy charged on land, which fails for any cause, only leaves the land to pass to the devisee, or heir, relieved of the charge. The effect of a charge, therefore, upon real estate, failing to become effectual, is to leave the estate to go in the same direction it would otherwise have done, free from the charge.

It was for a long time held, that any failure of a devise of real estate always enured to the benefit of the heir; and the authorities are conflicting, upon the point, whether the heir, or devisee, of such land, shall be benefited by the failure of a devise of any portion of the real estate, or of a charge upon real estate. But the more recent cases favor the devisee, which is in analogy to the rule applied to personalty. Re Cooper's Trusts, 4 De G., M. & G. 755; Hayes & Jarman, 140 and note. It is well that the will should contain specific directions upon this point.

Money arising from the sale of land, as directed in the will, which is given upon conditions, which fail, goes for the benefit of the heirs, as a general thing. But where the whole estate is directed to be converted into money; and the will contains a residuary clause, all legacies failing will fall into the general residuum, and go to the residuary legatee. Cooke *v.* Stationers Co. 3 My. & K. 262.

There is a distinction, in the English books, between a conversion of real estate into money, or other personalty, for the purposes of the will only; and a conversion, "out and out," as it is called; which is defined, a conversion for all purposes. In the former case the avails of land are still regarded, and distributed, the same as the land itself; but in the latter case, the land becomes personalty for all purposes and to all intents. Hayes & J. 141 and note.

And where an exception from the residuary clause is made in favor of a particular legatee or devisee; and such bequest fails for any cause, the failure enures for the benefit of the heir, or next of kin; as the construction is that this being expressly excepted from the residuary clause, it must, upon failure to become effectual, be regarded as so much of the estate undisposed of. Tucker *v.* Kayess, 4 Kay & J. 339. See also, Cooke *v.* Stationers Co., supra; Re Cooper's Trusts, supra.

The late English Statute of Wills, 1 Vict. ch. 26; 22 and 23 Vict. ch. 35, § 23, have made specific provisions in regard to lapsed legacies and devises. And there are some of the refinements of the English law, as to the distinctions between real and personal estate, which have no application in America, and have never been adopted by our courts.

A provision against impeachment for waste is very proper, where the devise is for the life of the devisee, and it is the primary object of the provision to make a comfortable provision for the first donee, and it is consequently desirable to confer the use of the estate in the most unrestricted manner, in order to accomplish the object in the fullest

*No. VII.

WILL OF A MARRIED MAN.

Will of a married man, providing for a wife and his son, an only child. Bequest of household effects to wife. Pecuniary legacy to testator's mother for life, then to his sister absolutely. Devise of real estates to wife for life, remainder to his son absolutely, with an executory devise, on his death under age, to wife absolutely. Power to lease. Bequest of residuary personal estate, to trustees for conversion and investment. Income to wife for life. Capital to son, with executory bequest, on his death under age, to wife. Provisions for maintenance and advancement of son. Powers to sell real estate, and invest the produce, to be held upon the trusts of the personal estate. To postpone the conversion of personal estate; to compound debts, &c.; to give receipts; to appoint trustees. Appointment of executors and guardians.

This is the last will and testament of me [testator's name, and residence]. I bequeath to my trustees and executors hereinafter named, * £—— apiece, and to my friends [names, &c.] £—— apiece, for a ring in remembrance of me. And I bequeath to my said trustees the sum of £——, upon trust, to invest the same in the names or name of the trustees or trustee for the time being of my will, in or on the public funds or government, or real securities in the United Kingdom, or on railway debentures, and to pay the annual income thereof to my mother [name] during her life, and after her decease, to transfer the principal fund to my sister [name], for her absolute use; and I empower my said trustees or trustee, with the consent in writing of my said mother, to change from time to time the investment of the same sum from any of the said funds or securities to any other or others of a like nature; and I direct the aforesaid legacies to be retained or paid at the end of three calendar months after my decease, and the lastly bequeathed legacy to carry interest at the rate of four per cent per annum from my decease. I bequeath all the furniture, plate, linen, china, glass, books, prints, pictures, wines, liquors, fuel, consumable provisions, and other household effects, of which I shall die possessed, unto my dear wife [name] absolutely. I devise all the real estate, of whatsoever tenure and wheresoever situate (including chattels real, to which I shall at my decease be entitled, either in possession, reversion, or otherwise (except estates vested in me as trustee or mortgagee), unto my said wife [name], and her assigns, for her life, without impeachment of waste, so far as I can grant that privilege, and after her decease unto my son and only child [name], his heirs, executors, administrators, and assigns; but if my said son shall die under

manner. But where it is the wish of the testator to secure the estate in the most perfect condition to the donees in remainder, no such clause should be inserted as to the first donee.

the age of twenty-one years (or under the age of twenty-one years without leaving issue), then I devise the same real estate unto my said wife, her heirs, executors, administrators, and assigns. And I empower my said wife, * during her life, and after her decease, the trustees or trustee for the time being of my will, during the minority of my said son, to grant leases of my said real estate, or any part or parts thereof, for any term or terms of years, not exceeding [twenty-one] years in possession, at the best rent, without taking any fine or premium, and upon such terms, in other respects, as the lessors or lessor shall think reasonable. I bequeath the residue of my personal estate to my trustees hereinafter named, upon trust, to convert and get in such residuary personal estate, and invest the moneys to arise therefrom in the names or name of the trustees or trustee for the time being of my will in or on the public funds or government or real securities in the United Kingdom; and upon further trust to permit and empower my said wife to receive the annual income of the said money, or the securities whereon the same shall be invested, during her life; and after her death, as to the said money and securities, and the annual income thenceforth to become due for the same, in trust for my said son, his executors, administrators, and assigns; but if my said son shall die under the age of twenty-one years (or under the age of twenty-one years without having issue), then in trust for my said wife, her executors, administrators, and assigns; and I empower my said trustees or trustee, with the consent in writing of my said wife, whether covert or sole, and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to change from time to time the investment of the last-mentioned moneys from any of the said funds or securities, to any other or others of the like nature. I further empower my said trustees or trustee, after the decease of my said wife, to apply such part, as they or he shall deem expedient, of the income of the real and personal property hereinbefore devised and bequeathed to or in trust for my said son, in or toward his maintenance and education, or otherwise for his benefit, during his minority. And I direct my said trustees or trustee to accumulate, during his minority, the unapplied income, by investing the same, with power to vary the investment as aforesaid, and to add the accumulations thereof to the capital of the personal property so bequeathed. I further empower my said trustees or trustee, with the consent in writing of my said wife, whether sole or covert, during her life, and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to apply any part or parts of the personal property so bequeathed as last aforesaid, or of the said * accumulations, not exceeding in the whole the sum of £——, in or toward the advancement or preferment in the world of my said son. I further empower my said trustees or

trustee, if they or he shall think it advantageous so to do, at any time or times, with the consent in writing of my said wife, whether covert or sole, and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to sell my said real estate, or any part or parts thereof, together or in parcels, by public sale or private contract, and convey the real estate so sold unto or according to the direction of the purchaser or purchasers thereof, with power to make any special conditions of sale as to the title or evidence of title, or otherwise, and with power to buy in the premises at any public sale, or to rescind either on terms or gratuitously any contract, and to resell without being answerable for any loss. And I direct that my said trustees or trustee shall invest the money to arise from the sale thereof in the manner hereinbefore directed concerning the money to arise from my residuary personal estate, and shall hold the funds or securities whereon the producers of my residuary personal estate may be invested. I declare, that my said trustees or trustee shall have a discretionary power to postpone, for such period as to them or him shall seem expedient, the conversion or getting in of any part of my residuary personal estate, which shall at my decease consist of shares in public companies, or of stocks, funds, or securities of any description whatsoever, but the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the money and funds and securities aforesaid, and the yearly proceeds thereof shall be deemed annual income for the purposes of such trusts. I devise all real estates which shall at my decease be vested in me as trustee or mortgagee, to my trustees hereinafter named, subject to the equities affecting the same respectively. I empower the trustees or trustee for the time being of my will to give receipts for all moneys and effects to be paid or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability, to see to the application or disposition of the money or effects therein mentioned, and as to any purchaser from inquiring into the necessity for or propriety of any sale or sales purporting to be made under the powers of this my will. I empower the trustees or trustee for the time being of my will to compound or allow time for the payment of any debt or debts due to my estate, and to satisfy all demands against my * estate, whether supported by strictly legal evidence or not; and to settle all accounts between me and any person or persons on such terms as my said trustees or trustee shall in their or his discretion think expedient; and to refer any matters in difference relating to my affairs to arbitration. I declare, that, if my trustees hereinafter named, or any or either of them, shall die in my lifetime, or if they or any or either of them, or any trustees or trustee to be appointed under this clause, shall after my death die, or

be unwilling, incompetent, or unfit to accept or execute the trusts of my will, or desire to retire from the office, it shall be lawful for my wife, whether covert or sole, and, after her death, for the trustees or trustee for the time being, if any, of my will, whether retiring from the office of trustee or not, or, if none, for the proving executors or executor for the time being, or for the administrators or administrator for the time being of the last deceased trustee, to substitute, by any writing under her, their, or his hands or hand, any person or persons, to be trustee or trustees in the place of the person or persons so dying (whether in my lifetime or afterwards), or refusing, or being incompetent, or unfit to act, or desiring to retire from the office. And I exempt every trustee of my will from liability for losses occurring without his own wilful default, and authorize him to retain and allow to his co-trustees all expenses incidental to the trusteeship. I appoint my friends [names and descriptions] to be trustees of my will; and I appoint my said wife [name], and the said [trustees], executrix and executors of my will, and guardians of my said son [name], during his minority. Lastly, I revoke all other wills. In witness, &c.[1]

*[1] The interest, or income, of legacies, is often a consideration of some importance, and in regard to which it may be well, in particular cases, to give specific directions in the will.

Legacies payable, generally, draw interest from the time of payment, which, in pecuniary legacies, is one year after the decease of the testator, where no other time is indicated. Pearson *v.* Pearson, 1 Sch. & Lef. 10.

But where the legacy is specific, as of private or public stocks, the legatee will take the income from the decease of the testator. Hayes & J. 202.

An annuity is payable at the end of one year from the death of testator; but the interest upon a sum of money set apart for the maintenance of persons, is not due until two years after the decease. Gibson *v.* Bott, 7 Vesey, 89, 96. But it is here doubted, whether a sum of money, directed to be put out at interest to produce a legacy, is to be treated as *legacy or annuity, with reference to the time of payment. And the general rule in regard to interest is declared in Tyrrell *v.* Tyrrell, 4 Vesey, 1. The exceptions are between parent and child, and in the case of a residue, where interest follows from the time of the decease, as a means of support. Macpherson *v.* Macpherson, 1 Macq. Ho. Lds. 243.

It is said, that where a sum of money is made payable out of land, the legacy carries interest from the death of the testator. Spurway *v.* Glynn, 9 Vesey, 483. Legacies payable out of the estate of a parent, or one in loco parentis, where there is a natural or moral obligation for support, draw interest from the decease of the testator, upon the presumption, that the testator must have intended it for that purpose. Mitchell *v.* Bower, 3 Vesey, 287; Long *v.* Long, id. 286, n. But this rule ceases to operate, where the parent has otherwise made provision for the support of the child. Donovan *v.* Needham, 9 Beav. 164. So also if the legatees, although children of the testator, are adults. Lowndes *v.* Lowndes, 15 Vesey, 301; Wall *v.* Wall, 15 Sim. 513.

As the law does not allow the trustees to reinvest trust funds, which had been once invested, either by themselves, or by the testator, during his lifetime, it is proper, in placing personal estate in trust, to give the trustees a discretion to invest the same, at

* No. VIII.

WILL OF A MARRIED MAN.

Will of a married man, providing for the wife and younger children; the eldest son having been provided for. Rent-charge to wife reducible on marriage. Residue (real and personal) to younger children, with executory limitations between them and the eldest son.

* This is the last will and testament of me [testator's name, residence, and quality]. I bequeath to my dear wife [name], all my household furniture, plate, linen, glass, china, books, pictures, prints, wines, liquors, fuel, housekeeping stores and provisions, and other effects of the like nature, and the sum of £——, to be paid to her out of the first moneys which shall come to the hands of my executors. I bequeath to my eldest son [name], (for whom I have already provided), the sum of £—— only, to be paid to him at the end of —— calendar months next after my decease. I devise to my said wife a yearly rent-charge of £—— for her life, if she shall so long continue my widow; but if she shall marry again, then a yearly rent-charge of £—— only, for the remainder of her life, the said yearly rent-charge of £——, or £—— (as the case may be), to be charged upon and issuing out of all the freehold hereditaments situate in the county of ——, to which I shall be entitled at my decease, and to be payable half-yearly, without deduction; and the first payment of the said yearly rent-charge of £—— to be made at the end of six calendar months computed from my decease, if my said wife shall be then living and my widow, and the first payment of the said yearly rent-charge of £—— to be made at the end of six calendar months computed from the second marriage of my said wife, and a proportionate part of each yearly rent-charge to be paid down to the determination thereof. And I empower my said wife, by

pleasure, by the written consent of the person entitled to the immediate income. Hayes & Jarman, 208; Sugden, Vendors & P. 546.

The appointment of testamentary guardians is regulated chiefly by statute. It does not extend to infant children married before the decease of the testator. Earl of Shaftsbury's Case, cited in 3 Atk. 625. But if appointed, and the testator decease before the marriage, the guardianship is not revoked by the marriage, id.

The right of the courts of equity to interfere in the guardianship of children, and to remove them from their natural or testamentary guardians, is extensively discussed by Vice-Chancellor *Kindersley*, in Curtis *v.* Curtis, 5 Jur. N. S. 1147, where it is held, that a child cannot be removed from the custody of the father or mother, merely because it would be for the benefit of the child. That the peculiar religious opinions, or the poverty of the father, form no ground of interference by the court. That mere acts of harshness or severity by a father, not such as would be injurious to the health of the children; or the fact of a somewhat passionate temper, will not form grounds for removing the children from his custody. See also, Re Fynn, 2 De G. & Sm. 457.

distress, and also by entry upon and perception of the rents and profits of my said hereditaments, so charged as aforesaid, to recover payment of the said rent-charges, respectively, when in arrear for twenty-one days. I devise and bequeath all the real estate, and the residue of the personal estate, to which I shall be entitled at my decease (but, as to my freehold hereditaments so charged as aforesaid, subject to such of the rent-charges as shall for the time being be payable), unto my younger children [names], in equal shares, as tenants in common, their respective heirs, executors, administrators, and assigns. But if any of them shall die under the age of twenty-one years, without leaving issue, then I devise and bequeath the share or shares, as well original as accruing, of such of them as shall so die, to my said eldest son, and to the others or other of my said younger children, in equal shares, as tenants in common, their respective heirs, executors, administrators, and assigns. And I direct and empower my trustees hereinafter named, during the minorities of such of my said younger children as shall be under age at my * decease, to receive the annual income of their respective shares of my real and residuary personal estate, and to apply the same, or so much thereof as such trustees shall think expedient, in or towards the maintenance and education, or otherwise for the benefit of such children respectively, and to invest and accumulate the unapplied surplus, and add the accumulations to the respective shares whence the same shall have arisen; and also to apply, in or towards the advancement in the world of such children respectively, any part, not exceeding one-half, of the principal or value of their respective shares, and for that purpose to raise, by mortgaging or charging my real estate, or any part or parts thereof, such sum or sums of money as my said trustees shall think fit. I also direct and empower my said trustees to convert and get in my residuary personal estate, as and when they shall think fit, and to invest the net proceeds thereof, in their names, in or upon the public stocks or funds of the United Kingdom, or on real securities in England or Wales, and to vary the investment, for any other or others of a like nature, when and as they shall think fit, until the same shall become distributable under the dispositions hereinbefore contained. I also direct and empower my said trustees, during the minorities or minority of such of my said younger children as shall be under age at my decease, to let my said real estate from year to year, or for any term not exceeding (seven) years, in possession, at the best rent, and subject to such covenants and conditions as my said trustees shall think reasonable, and generally to manage and direct all the affairs and concerns of my said real estate and residuary personal estate, so far as regards the share and interest, or respective shares and interests, of the minor or minors, in such manner as my said trustees shall in their dis-

cretion judge most beneficial to such minor or minors. I also empower my said trustees to compound and compromise debts and demands claimed as due from or to my estate; and to settle and adjust my accounts, and to refer disputes arising out of my affairs to arbitration; (or I empower my said trustees to compound or allow time for the payment of any debt or debts due to my estate, and to satisfy all demands against my estate, whether supported by strictly legal evidence or not; and to settle all accounts between me and any person or persons, on such terms as my said trustees shall in their discretion think expedient; and to refer any matters in difference relating to my affairs to arbitration). I declare and direct, that any mortgage which shall be executed by my said trustees, may, in * their discretion, contain a power of sale; and that any mortgagee shall not be bound to inquire into the necessity of raising the moneys advanced by him. I also empower my said trustees to give effectual discharges for all moneys paid to them as such trustees. I devise to my said trustees [names], all the real estate which shall at my decease be vested in me as mortgagee or trustee, subject to the equities affecting the same respectively. I declare, that, if my trustees hereinafter named, or any of them, shall die in my lifetime, or if they or any of them, or any trustees or trustee to be appointed under this clause, shall, after my death, die, or be unwilling or incompetent or unfit to accept or execute the trusts of my will, or desire to retire from the office, it shall be lawful for my wife, so long as she shall continue my widow, and, after her death or marriage, for the competent accepting trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the proving executors or executor for the time being, or the administrators or administrator for the time being of the last deceased trustee, to substitute, by any writing under her, their, or his hands or hand, any person or persons, in whom alone, or (as the case may be) jointly with any surviving or continuing trustees or trustee, my trust estates shall vest or by proper assurances be vested. And I exempt every trustee of my will from liability for losses occurring without his own wilful default; and authorize him to retain and allow to his co-trustees or co-trustee all expenses incidental to the trusteeship. And I declare that the powers and discretions hereinbefore vested in the trustees hereinafter named, shall be exercisable by the trustees or trustee for the time being of my will. I appoint my friends [names, &c.], to be trustees of my will; and I appoint my said wife [name], she continuing my widow, and the said (trustees), to be executrix and executors of my will and guardians of my children during their respective minorities. Lastly, I revoke all other wills.[1] In witness, &c.

* [1] It is important that specific provisions be contained in the will, in regard to apply-

* No. IX.

WILL OF A MARRIED MAN.

Will of a married man, providing for a wife and adult children. Bequest to wife of wines, &c., and the use of furniture. Real estate, and residue of personal estate, vested in trustees for sale and conversion; income to wife for life. Legacy out of capital to one child, and surplus among the other children; share of daughter for her separate use. Trustees not to sell real estate in wife's lifetime without her consent, and to be at liberty to postpone the conversion of personalty. Devise of mortgage and trust estates. Powers to give receipts, compound debts, and appoint trustees. Appointment of executors.

This is the last will and testament of me [testator's name, &c.]. I bequeath the wines, liquors, fuel, and other consumable household stores and provisions, and the linen, china, and glass, of which I shall die possessed, to my dear wife [name], absolutely. I bequeath to my said wife the use and enjoyment, during her life, of the household furniture and utensils not hereinbefore bequeathed, and the plate, books, pictures, and prints of which I shall die possessed. And after her decease, I direct the same articles to be disposed of as part of the residue of my personal estate (*or*, I bequeath the same to my four children [names], to be divided between them as nearly as may be in equal shares, and if any dispute shall arise concerning the division thereof, then such division shall be made by the trustees or trustee for the time being of my will, whose determination shall be final). And I direct my executors to cause an inventory to be taken of the same articles before the delivery thereof to my said wife, and two copies of such inventory to be signed by my said wife, of which copies so signed one shall be delivered to her, and the other be kept by my executors.[1] I devise all the real

ing any part of the corpus of a fund committed to trustees, towards the support, or the settlement in life of the beneficiaries. For otherwise, where the remainder is given over, in case of the decease of the first legatees, before a certain age, or in any other event, the trustees will have no power to apply any portion of the principal sums, for any such purpose. Walker *v.* Wetherell, 6 Vesey, 472. Such powers must be followed strictly. And even where such a discretion is committed to two trustees, it cannot be exercised by one of them, although he is the only one active in the discharge of the duties. Palmer *v.* Wakefield, 3 Beavan, 227. The court have no power to apply the principal for the benefit of the beneficiary unless authority is given in the will. Lee *v.* Brown, 4 Vesey, 362; or those entitled in remainder appear and consent. Evans *v.* Massey, 1 Y. & Jerv. 196.

[1] The courts of equity formerly allowed the party entitled to a fund in remainder to claim security of the tenant for life, against waste during his term, upon showing a case of actual danger. Foley *v.* Burnell, 1 B. C. C. 279; Conduitt *v.* Soane, 1 Coll. 285. But, as a general rule, the party, entitled to the possession of a legacy, may demand the

estate to which I shall be *entitled at my decease (except estates vested in me as trustee or mortgagee), and I bequeath the residue of the personal estate to which I shall be then entitled, to [names, &c.], their heirs, executors, administrators, and assigns, respectively, upon trust to sell my real and leasehold estates, together or in parcels, by public auction or private contract, with power to make any special conditions as to title or evidence of title, or otherwise, and with power to buy in the premises at any public sale, or to rescind either on terms or gratuitously any contract, and to resell without being answerable for any consequent loss; and to convey and assign the premises respectively so sold to the purchaser or purchasers thereof; and to convert and get in my other residuary personal estate, and invest the moneys to arise from such real and leasehold estates, and residuary personal estate, in the names or name of the trustees or trustee for the time being of my will, in or upon any of the public stocks, funds, or securities of the United Kingdom, or any real or leasehold securities in England or Wales, with liberty for the said trustees or trustee, with the consent in writing of my said wife, to vary and transpose the investment from time to time for any other investment of the description aforesaid; and upon further trust to permit and empower my said wife to receive the annual income of the said moneys, or the stocks, funds, and securities whereon the same shall be invested, during her life; and after her death, as to the said moneys, stocks, funds, and securities, and the annual income thenceforth to become due for the same, upon trust to pay thereout to my said son [name], his executors, administrators, or assigns, the sum of £——, which sum shall be absolutely vested in him on my decease,[2] and *shall carry interest after the rate of £4 per cent per annum from the decease of my said wife until payment thereof; and, subject to the payment of the same sum and interest, in trust for my other children [names], to be divided equally among them,

same, when it becomes due. Fawkes *v.* Gray, 18 Vesey, 131; Griffiths *v.* Smith, 1 Ves. Jr. 97. The English courts of equity now restrict their interference to the requisition for an inventory from the legatee for life.

[2] Many very nice questions have arisen, upon the appointment of new trustees in the place of such as have deceased, disclaimed, or otherwise become disqualified. The exercise of this function by the existing trustees is often a very difficult matter to be determined. The vacancy must clearly have occurred. If not, the old trustees will exercise the function, notwithstanding the new appointment. Warburton *v.* Sandys, 14 Sim. 622; Miller *v.* Priddon, 1 De G., M. & G. 335. We need not here go into the detail of the question arising in regard to such appointment.

The safer and more prudent course is, not to give the trustees the power to supply vacancies in their own number, but to leave that to the proper tribunals; who may, at any time, be applied to for the purpose of supplying any vacancies which may occur, and can do it, without subjecting the parties to the uncertainties resulting from supplying such vacancies by virtue of a power of appointment.

their respective executors, administrators, and assigns; and the respective shares of such children to be absolutely vested on my decease; and the share of my said daughter [name] to be received, enjoyed, and disposed of by her as her separate estate, without the control or interference of her present or any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same. Nevertheless, I declare, that no sale of my real estate, or any part thereof, shall be made in the lifetime of my said wife, without her previous consent in writing; and that my trustees or trustee for the time being shall have a discretionary power to postpone for such period as to them or him shall seem expedient, the conversion or getting in of any part of my residuary personal estate, which shall at my decease consist of stocks, funds, shares, or securities of any description whatever; but the unsold real estate, and outstanding personal estate, shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds, and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate under the ultimate trust hereinbefore contained. I devise all real estates (if any) vested in me as trustee or mortgagee to the said [trustees], subject to the equities affecting the same respectively. I empower the trustees or trustee for the time being of this my will to give receipts for all moneys and effects to be paid or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from liability to see to the application or disposition of the moneys or effects therein mentioned. I empower the trustees or trustee for the time being of my will to compound or allow time for the payment of any debt or debts due to my estate, and to settle all demands against my estate, and all accounts between me and any person or persons, on such terms as my * said trustees or trustee shall in their or his discretion think expedient, and to refer any matters in difference relating to my affairs to arbitration. I declare, that, if my said trustees, the said [names], or any of them, shall die in my lifetime, or if they or any of them, or any person or persons to be appointed under this clause, shall, after my death, die, or be unwilling, incompetent, or unfit to execute the trusts of my will, or desire to retire from the office, it shall be lawful for my said wife during her life, and, after her death, for the competent trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the proving executors or executor for the time being, or the administrators or administrator for the time being, of the last surviving trustee, to substitute, by any writing under her, his, or their hand or hands, any fit person or persons, in whom alone, or, as the case may be, jointly

with the surviving or continuing trustees or trustee, my trust estate shall vest, or, by proper assurances, be vested; and I exempt every trustee of my will from liability for losses occurring without his own wilful default, and authorize him to retain and allow to his co-trustee or co-trustees all expenses incidental to the trusteeship. I appoint the said [trustees] to be executors of my will. Lastly, I revoke all other wills. In witness, &c.

No. X.

WILL OF A FARMER, DISPOSING OF HIS PERSONAL PROPERTY.

Will of a farmer, disposing of his personal property in favor of his wife and infant children. Legacies to children at twenty-one or marriage. The wife to be sole trustee and executor during widowhood; with large discretionary powers to carry on the farming-business, and manage the estate generally. Wife marrying to have an annuity; on her death or marriage the property is vested in trustees for the benefit of the children. Devise of mortgage and trust estates. Power to compound debts, &c. Provisions for appointing and indemnifying trustees.

This is the last will and testament of me [testator's name, &c.]. I give to each child of mine, who, being a son, shall at my death have attained the age of twenty-one years, or shall afterwards attain that age, or, being a daughter, shall at my death have attained that age or have been * married, or shall afterwards attain that age or be married, a portion of £200, to be paid to children being at my death objects of this gift, at the end of six calendar months after that event, and to children subsequently becoming objects thereof at the end of six calendar months after they shall respectively become such objects; but advances[1] made by me to any child or children in my lifetime shall, accord-

*[1] Where portions are provided in the will, advances made by the testator to the same person, in the same way, after the date of the will, are generally regarded as towards such portions. Ex Parte Pye, 18 Vesey, 140; Thellusson *v.* Woodford, 4 Madd. 420; Pym *v.* Lockyer, 5 My. & Cr. 29. But when there is any variation between the nature of the advancement and the provisions in the will, in regard to portions, nice questions may, and naturally will arise, in regard to its being reckoned towards the portion.

To avoid all questions of this kind, it is better to provide in the will, that all advances made to any legatee in the will, and which are charged on book, or in some other prescribed form, or which are acknowledged by the legatee, as such, shall be reckoned by way of advancement towards the legacy.

This course will save all questions, both in regard to the uncertainties of the law, and of proof of the intention of the testator, in regard to payments made for the benefit of any of the legatees after the date of the will.

ing to the amount thereof, be taken in full or in part satisfaction of his, her, or their portion or portions, unless I shall otherwise declare by writing under my hand. I empower my wife [name], to carry on my farming and grazing business, and for that purpose to continue tenant of the farm which I shall use at my decease, or to hire and use any other farm and employ my live and dead agricultural stock, and such part of my personal estate as she shall think fit, with liberty for her at any time to transfer the business to any son or sons of mine, or admit any son or sons of mine to a share thereof, and lend to him or them the capital employed or requisite to be employed therein, or any part thereof, upon such security and such terms as she shall think reasonable. I empower my said wife to manage my personal estate generally in such manner as shall appear to her to be most advantageous to my family, with liberty, at her discretion, either to permit it to continue in the state in which it shall be found at my death, or to get it in, and invest the proceeds in her name, upon any stocks, funds, or securities, or at any rate of interest, or in the purchase of any real or personal property, and to vary the investment when and as she shall think fit (the real property so purchased to be considered as converted into and * treated as personalty for all the purposes of my will). I give to my said wife all the income of so much of the personal estate to which I shall be entitled at my decease as shall be in any wise employed or invested (inclusive of the profit of the said business), and also the use of the residue thereof, but charged with the maintenance, education, and bringing-up, in a manner suitable to their station in life, of my sons for the time being under the age of twenty-one years, and my daughters for the time being under that age not being or having being married. In the event of my said wife marrying again, I thenceforth annul the powers and benefits hereinbefore given to my said wife, and give to her an annuity of £25 during the remainder of her life, payable quarterly into her proper hands and on her personal receipt, as a separate and inalienable provision, the first payment to accrue due and be made at the end of three calendar months after her marriage, if she shall within that time account for and deliver up my personal estate in her hands to the other trustees or trustee for the time being of my will, to their or his satisfaction; and, if not, then at the end of three calendar months after such accounting and delivery. And I declare, that if my said wife shall, either before or after such her second marriage, do or suffer any act or thing whereby her said annuity of £25, or any part thereof, shall be aliened or incumbered, the same annuity shall thereupon cease. I declare, that on the death or marriage of my said wife, my personal estate shall vest in the other trustees or trustee for the time being of my will, who shall have the same power and liberty in

regard to my business as I have given to my wife by the second clause of my will, carrying on the same for such period as the circumstances of my estate or my family shall, in the opinion of my said trustees or trustee, render it convenient or desirable so to do; and, subject thereto, shall convert or get in my personal estate, not invested in stocks, funds, or securities of the United Kingdom, or on real securities in the United Kingdom, and invest and place out the produce in and upon investment of that description, but with liberty to continue any investments of a different description which they or he shall think it inexpedient to disturb, and with power to vary from time to time the investment of my personal estate, so as the investment be confined to stocks, funds, or securities of the description aforesaid. I declare, that the said trustees or trustee shall hold my personal estate, from and after the death or marriage of my said wife, in trust for my child, if only one, wholly, or all my children, if more * than one, equally, to be absolutely vested in a son or sons at the age of twenty-one years, and in a daughter or daughters at that age or marriage; and, as to the share or shares, original and accruing, of a son or sons dying under that age, and of a daughter or daughters dying under that age without having been married, in trust for the other or others of my children, conformably to the preceding trust; with power for the said trustees or trustee to apply the whole or part of the income, and any part not exceeding one moiety of the capital of each child's original and accruing share not absolutely vested, for his or her benefit by way of maintenance, advancement, or otherwise, and the unapplied income of each such share shall be accumulated, and the accumulations be deemed an accretion to the same share. I devise all lands and hereditaments which shall, at my decease, be vested in me as mortgagee or trustee, in fee or otherwise, unto and to the use of my friends [names, &c.], their heirs, executors, administrators, and assigns, subject to the trusts and equities affecting the same respectively, and to the purposes of my will. I appoint my said wife, during widowhood, and on her death (or if she shall marry again then on her marriage) my said friends [names], to the offices of executor and trustee of my will, and guardian of my infant children, with full powers to compound and compromise debts and claims, and settle my accounts and affairs, and to give receipts for moneys paid or accounted for to my estate by purchasers or others, who shall be exonerated by such receipts from all liability in respect of the application of the money. And I declare, so far as concerns the trusteeship of my said friends, that vacancies occurring therein from death in my lifetime or otherwise, disclaimer, resignation, unfitness, or incapacity, may from time to time be supplied by the other trustees or trustee for the time being, or, if none such, then by the disclaiming or resigning trustees or

trustee, or, if also none such, by the proving executors or executor for the time being, or the administrators or administrator for the time being, of the last deceased trustee. And I declare, that as well my said wife as the other trustees or trustee of my will, shall be chargeable only to the extent of her, his, or their respective actual receipts, and be exempt from responsibility for involuntary losses, and be entitled to retain all disbursements and expenses incident to the execution of my will. I revoke all prior wills. In witness, &c.

* No. XI.

WILL DEVISING ESTATES TO THE USES OF A STRICT SETTLEMENT MADE UPON THE TESTATOR'S MARRIAGE.

This is the last will and testament of me [testator's name, &c.]. Whereas, by the settlement made in contemplation of my marriage with my wife [name], by indentures of lease and release, bearing date respectively, &c., divers hereditaments therein described were settled by me to the use of myself for life, with remainder to the use of trustees and their heirs, during my life, to preserve contingent remainders; with remainder (subject to limitations for securing a jointure rent-charge to my wife, if she should survive me, for her life, and to a term of five hundred years for raising portions for our younger children), to the first and other sons of our marriage successively in tail male; with remainders over; which settlement contains divers powers and provisions concerning the said hereditaments. Now I do hereby subject all the hereditaments of which I am competent to dispose, with the appurtenances, to such of the uses, trusts, powers, and provisions contained in the said settlement concerning the hereditaments thereby settled posterior to the limitation of the said term of five hundred years, as at the time of my death shall be capable of effect; and I confirm the said settlement. In witness, &c.

No. XII.

CODICIL MAKING ALTERATIONS AND ADDITIONS TO THE WILL, AND APPOINTING DIFFERENT EXECUTORS OR TRUSTEES.

This is a codicil to my last will and testament, dated —— .A.D. ——. Whereas, by my said will I have given my wife one-third part of all

my real and personal estate, I now declare that it is my will, that, instead of that provision, she shall have the use of one-half of all my estate, real and personal, during her natural life; and so much of the principal as may be necessary or convenient for her support during the term of her natural life, or so long as she shall remain my widow. And in * the event of her marrying again, she shall be entitled to the absolute property in one-third of all my personal estate which shall then remain, and the use of one-third of my real estate during her life; and at the decease or marriage of my said wife, the remainder of all my estate, real and personal, including the reversion of the portion of the real estate, the use of which is hereinbefore devised to my said wife, shall be equally divided among my children, and the issue of any deceased child, such issue taking the share to which such child would have been entitled if living.

And I hereby revoke the appointment of A. B. to be one of my executors and trustees; and I appoint C. D. to that office, with all the powers and duties in my said will declared.

Or, instead of the persons named as executors and trustees in my said will, I hereby appoint —— —— ——

No. XIII.

NUNCUPATIVE WILL.

A nuncupative will, as the term implies, is not made in writing, but by the *declaration* of the testator, in the presence of witnesses. It is proper, although not indispensable, that such declarations should be reduced to writing, in the presence of the witnesses, at the time they are made, and subscribed by them, or some of them.

The form of the memorandum is not important, but the precise words of the testator should be preserved.

FORM.

The following is the will of A. B., mariner, soldier, or otherwise, of ——, who, being sick and nigh unto death, which occurred the day following, at six o'clock, P.M. The same was made by the said A. B. in the presence of the persons whose names are hereto subscribed, and who were specially requested by said testator to take notice of the same, as witnesses, and was in these words:

* "I give my watch to A. B., my silver spoons to C. D.," &c., detailing each particular.

"All the rest I give to my wife, and she will carry this will out. She shall be the executrix.

"Done in the sick-chamber of the said A. B. on Monday the 10 April, 1864, at nine o'clock, P.M."

A. B.
C. D. } WITNESSES.
E. F.

If there is time and opportunity to read over the memorandum in the presence of the testator, it would be proper to state that fact in the memorandum.

An instrument for the mere purpose of revocation is sometimes executed, but as this is more readily effected by defacing the will, it is usually done in this mode, where that is at hand.

And it is common to make, in drawing a new will, a formal revocation of all former wills. But this is not important, as the making of a new will, embracing an entire disposition of the testator's estate, is, in itself, a revocation of all existing wills of the testator.

The form of a revocatory will, or of a revocatory clause, is much the same.

"I HEREBY REVOKE ALL FORMER WILLS AND CODICILS BY ME MADE."

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